Supreme Court, U.S.
FILED

01 107 JUL 17 2001

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

ULYSSES I & COMPANY, INC.,

Petitioner,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK; SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARC S. DREIER
Counsel of Record
DREIER & BARITZ LLP
499 Park Avenue
New York, New York 10022
(212) 328-6100

Counsel for Petitioner
Ulysses I & Company, Inc.

104 pp

QUESTIONS PRESENTED

1. Whether federal law confers rights and protections on a duly recorded title holder of real property for so long as he remains the title holder, separate and apart from any ultimate disposition in respect of the ownership of that property.

2. Whether petitioner's claims herein under 42 U.S.C. §1983 are so "inextricably intertwined" with a judgment previously entered in state court rejecting petitioner's claim of ownership of the property in issue as to deprive the district court of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

STATEMENT PURSUANT TO RULE 29.6

Petitioner has no parent companies or non-wholly owned subsidiaries that need to be listed pursuant to Rule 29.6.

LIST OF PARTIES

The parties remain those named in the caption, with the exception of the State of New York, which was voluntarily dismissed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
STATEMENT PURSUANT TO RULE 29.6 iii
LIST OF PARTIES iii
TABLE OF CONTENTS v
TABLE OF AUTHORITIES vii
APPENDIX ix
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
STATEMENT OF FACTS 3
1. Ulysses' Acquisition Of The Premises 3
2. The County Clerk's Unlawful Assistance to Feldstein's Wrongdoing 6
3. Respondents' Unlawful Exclusion Of Ulysses From The Property 7
4. The Unlawful Intervention Of The Village Police 8
5. The Unlawful Judgment Of The State Court 9
6. The Federal Complaint 10
7. The Decisions Below 11

ARGUMENT

CERTIORARI SHOULD BE GRANTED, BECAUSE, IN DENYING PETITIONER THE PROTECTION OF FEDERAL LAW AS THE DULY RECORDED TITLE HOLDER OF REAL PROPERTY, THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE BUT HAS NOT BEEN SETTLED BY THIS COURT 12

1. The Courts Below Erred in Dismissing The Action Under Rule 12(b)(1) 14

2. The Second Circuit Erred In Dismissing The Amended Complaint Under Rule 12(b)(6) 20

CONCLUSION 24

TABLE OF AUTHORITIES

Banks v. Banks, 121 A.D.2d 421, 503 N.Y.S.2d 119 (2d Dep't 1996) 17

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 21

City of Tonawanda v. Ellicott Creek Homeowners Association, 86 A.D.2d 118, 449 N.Y.S.2d 116 (4th Dep't 1982) 17

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 14

Goldberg v. Feldstein, Case No. 98-17645 (BKC-ATC), Adv. No. 00-1364 (Bankr. S.D. Fla.) 4

Hughes v. City of Albany, 189 F.3d 461 (2d Cir. 1999) ... 20

LeGrand v. Evan, 702 F.2d 415 22

Lojo Realty Co., Inc. v. Estate of Isaac C. Johnson, 227 A.D.2d 292, 237 N.Y.S.2d 460 (1st Dep't 1929), *aff'd*, 253 N.Y. 579 (1930) 4

Moccio v. New York State Office of Court Administration, 95 F.3d 195 (2d Cir. 1996) 14, 16

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 21

Pangburn v. Culberston, 200 F.3d 65 (2d Cir. 1999) 21

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) 14, 15

Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991) 20

Rooker v. Fidelity Trust Company, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 14

Roxbury Light & Power Co. v. Dimmick, 196 N.Y.S.320 (Cty. Ct. Del. Co. 1922) 17

Serlucco v. New York City Police Department,
971 F.2d 864 (2d Cir. 1992) 21

Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1995)... 20

APPENDIX

Appendix A —
Summary Order of the United States Court of Appeals for the Second Circuit (filed April 18, 2001) A-1

Appendix B —
Judgment of the United States District Court for the Eastern District of New York (entered September 11, 2000) B-1

Appendix C —
Order of the United States District Court for the Eastern District of New York (filed August 16, 2000) C-1

Appendix D —
Order of the United States District Court for the Eastern District of New York (filed August 16, 2000) D-1

Appendix E —
Order of the United States District Court for the Eastern District of New York (filed August 11, 2000) E-1

Appendix F —
Order of the United States District Court for the Eastern District of New York (filed August 11, 2000) F-1

Appendix G —
Decision of the United States District Court for the Eastern District of New York (Dated August 1, 2000) G-1

Appendix H —
Order of the Supreme Court for the State of New York, County of Suffolk (Dated May 14, 2001) H-1

Appendix I —

Judgment of the Supreme Court for the State of New York, County of Suffolk (Dated February 8, 2000) I-1

Appendix J —

Decision and Judgment of the Supreme Court for the State of New York, County of Suffolk (Dated January 31, 2000) J-1

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ulysses I and Company, Inc., respectfully petitions the Court for a writ of certiorari to review the judgment of the United States District Court for the Eastern District of New York, entered on September 11, 2000, as affirmed by the Order of the United States Court of Appeals for the Second Circuit, filed on April 18, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix at A-1. The opinion of the district court is unreported but transcribed on the record and reproduced in the Appendix at G-1.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry of the Order issued by the Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which state, in relevant part, "nor shall any State . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983, which states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arises from the deprivation of petitioner's Constitutional rights, civil rights and property rights as the duly recorded title holder of certain real property located in East Hampton, New York.

Petitioner, Ulysses I & Company, Inc. ("Ulysses"), purchased this property in August 1998 and duly recorded its title in September 1998. In February 2000, the Supreme Court for the State of New York, Suffolk County, entered judgment awarding ownership of the property to the respondent, Gary Feldstein ("Feldstein"), finding, albeit erroneously, that Feldstein had a superior contractual right to purchase the property. In the interim, however, while Ulysses remained the title holder of the property and paid all taxes on the property, Ulysses was repeatedly denied all protection of the law as to the use and enjoyment of the property by the local police and authorities. By reason thereof, Ulysses asserted claims in the United States District Court for the Eastern District of New York for violations of 42 U.S.C. § 1983, as well as various pendent claims under the common law. Ulysses' complaint was dismissed, with prejudice, by the district court by judgment affirmed by the United States Court of Appeals for the Second Circuit. The courts below, however, failed to recognize the essential question raised by the complaint and by this petition, *i.e.* whether a duly recorded title holder to real property has certain federally protected rights to the use and enjoyment of his property until such time as it may be judicially determined that rightful ownership lies elsewhere. Instead, the courts erroneously pointed to the state court judgment — entered 16 months *after* petitioner recorded title — as disposing of all of petitioner's claims and depriving the district court of jurisdiction under the *Rooker-Feldman* doctrine. Petitioner respectfully requests this Court to clarify and confirm that until title to real property is conveyed, either voluntarily or by judicial compulsion, the title holder is entitled to the protections of the law as if he were the rightful owner.

STATEMENT OF FACTS

1. Ulysses' Acquisition Of The Premises

In or about October 1992, Jack Rounick ("Rounick"), the owner of the premises at 57 West End Road in East Hampton (the "Premises"), entered into a certain lease agreement with Feldstein (the "1992 Lease"), by which Feldstein, as tenant, took possession of the Premises (JA 15 ¶ 16). In May 1993, Rounick and Feldstein entered into a certain Sales Contract superseding the 1992 Lease, whereby Feldstein agreed to purchase the Premises for the sum of $7 million, of which $1.7 million (including the amount already paid under the 1992 Lease) would be paid in installments before the scheduled closing, $1.3 million would be paid upon closing, and $4 million would be paid in installments on specified dates after the closing. Rounick structured the installment payments in such manner as to obtain certain tax benefits (JA 15 ¶ 17).

The Sales Contract between Rounick and Feldstein originally called for a closing on or before October 1, 1997. By a Second Amendment to the Sales Contract dated as of May 30, 1997, Rounick agreed to extend the closing date until October 1, 1998. Pursuant to the Second Amendment, Feldstein was also given the right to accelerate the closing date, conditioned upon his making an advance payment upon such election, in the amount of $1.1 million (JA 15 ¶ 18). Under the terms of the Sales Contract, Feldstein was allowed to continue in occupancy of the Premises until the October 1, 1998 closing date, provided that, while doing so, he met his periodic payments and other obligations under the Sales Contract. After that, Feldstein would have to vacate the Premises if he failed to close. (JA 16 ¶ 19).

In or about June 1998, as the closing date approached, Feldstein informed Rounick that he was having financial difficulties and that it was doubtful he could purchase the Premises as scheduled. Shortly thereafter, Feldstein's principal business, Total Physicians' Services, Inc. ("TPS"), of which he was Chairman of the Board and Chief Executive Officer, filed for

bankruptcy.[1] Rounick reasonably concluded that Feldstein could not close as scheduled and undertook to look for another buyer (JA 16 ¶ 20).

Feldstein, in the meantime, purported to assign to a third party his rights and obligations under the Sales Contract, further demonstrating that he was not prepared to close. On August 10, 1998, he entered into a certain Agreement to Assign and Assume (the "Assignment") with the respondent Peter Morton ("Morton"), pursuant to which Feldstein purported to assign to Morton all of his rights and obligations under his Sales Contract with Rounick. Under the terms of the Assignment, Morton agreed to pay Feldstein $9.7 million (JA 16 ¶ 21). Under New York law, however, Feldstein's obligations under the Sales Contract could not be assigned without Rounick's consent. *See Lojo Realty Co., Inc. v. Estate of Isaac C. Johnson*, 227 A.D.2d 292, 237, N.Y.S.2d 460 (1st Dep't 1929), *aff'd*, 253 N.Y. 579 (1930). A few days after entering into the Assignment, Feldstein requested Rounick's consent to assign, which Rounick refused (JA 16 ¶ 22).

Failing to obtain consent to the assignment, Feldstein attempted to change the purchase price. Feldstein's lawyer called Rounick to tell him "you're not going to get all your money right away; you're going to be discounted." Rounick concluded he was "getting my chain pulled on this deal." He told Feldstein's attorney that the "discounted" price, like the assignment, was unacceptable (JA 17-19 ¶ 23).

Nevertheless, by letter dated August 20, 1998, Feldstein informed Rounick, in blatant breach of their Sales Contract, that he intended to proceed with the discounted purchase price and/or assignment anyway. The letter stated as follows:

> This letter shall serve to inform you that our client, Gary Feldstein, has entered into an agreement to assign (the 'assignment') his contractual right to purchase 57 West

---

[1] The TPS bankruptcy trustee thereafter filed suit against Feldstein for the unlawful diversion of funds to himself. *See Goldberg v. Feldstein*, Case No. 98-17645 (BKC-ATC), Adv. No. 00-1364 (Bankr. S.D. Fla.).

> End Road, East Hampton, New York (the 'Property'). In connection with this agreement, Gary would like to propose to you the following alternatives: (A) *amend the existing contract* between you and Gary (the 'Contract') *to cause* a mutually agreeable amount representing *the present discounted value of all future payments to be made to you under the Contract to paid to you at the closing of title to the Property* (which we will schedule to occur at 10:00 a.m. on August 28, 1998 at our offices), *or* (B) *Gary* and the assignee of the Contract *will close the Assignment, accelerate the closing of title to the Property to August 28, 1998* in accordance with Paragraph 2(a)(iii) of the Contract, *and the assignee will assume all of Gary's payment obligations under the Contract and continue to make such payments as and when due thereafter.*
>
> Please ask your attorney to contact me by the end of business on Tuesday, August 25, to inform us whether you wish to consider alternative (A) above. *If I have not heard from your attorney by the end of business on the 25th, we will proceed with the Assignment and close title to the property on August 28, 1998 at our offices.* (Emphasis added).

(JA 19-20 ¶ 25).

Thus, Feldstein purported to dictate new terms to Rounick: either sell the property for an amount "discounted" from the contract price, or accept an undisclosed assignee under undisclosed terms who would succeed to Feldstein's obligations to Rounick in violation of New York law (JA 20 ¶ 27). Furthermore, under either of the "options" in Feldstein's August 29 letter, the closing was to be accelerated to August 28, 1998 — but Feldstein did not tender the $1.1 million advance payment which was required under the Sales Contract upon any election by Feldstein to accelerate the closing (JA 20 ¶ 28).

Based on Feldstein's new and inequitable demands, Rounick reasonably and rightfully determined that Feldstein had

renounced the Sales Contract and forfeited any remaining rights thereunder (JA 21 ¶ 29). On August 25, 1998, Rounick sold the Premises to Ulysses, for the sum of $4,925,000 (approximately the same amount that would have remained due from Feldstein under the Sales Contract) (JA 21 ¶30). By letter dated August 25, 1998, Rounick informed Feldstein that as of that date he had conveyed title to the Premises to Ulysses and gave Feldstein notice that any "future payments which may be due with respect to the property and all communications regarding the property should be directed to Ulysses" at the address provided (JA 21 ¶ 31).

Feldstein, however, ignored the notice. He made no further payments to either Ulysses or Rounick (JA 21 ¶ 32). He failed to make the installment payment of $33,500 due on September 1 and failed to pay the property taxes due on August 31. Moreover, he purported to hold a closing on September 10, 1998 but failed to tender the $1.1 million due upon an acceleration of the closing date (JA 22 ¶ 32). He then failed to attempt any closing on the October 1, 1998 closing date provided for in the Sales Contract (JA 22 ¶¶ 33-34).

2. The County Clerk's Unlawful Assistance to Feldstein's Wrongdoing

After Ulysses obtained title to the Premises from Rounick on August 25, 1998, the title company engaged by Ulysses submitted the Deed for recording in the Office of the County Clerk on or about August 28, 1998. However, on or about September 9, 1998, the Deed was rejected by the County Clerk, without cause, for purported "illegibility," despite the fact that the Deed submitted was perfectly legible. The Deed was then reexecuted, resubmitted, in essentially the same form, and finally recorded by the County Clerk on September 21, 1998, almost a month after the Deed had been duly submitted for recording (JA 23 ¶¶ 35-36).

In the meantime, on or about August 31, 1998, Feldstein filed suit in state court and served on Ulysses a Notice of Pendency purportedly filed with the County Clerk. The Notice of

Pendency, however, was plainly falsified. It is dated August 31, 1998 and stamped as having been recorded by Edward P. Romaine, the Clerk of Suffolk County, on August 31, 1998, at 9:29 A.M. Clearly, however, the recording was altered. The date "Aug. 31" was handwritten over the actually stamped date, which was "whited out." Upon careful examination, it is clear that the originally stamped date was a September date (JA 23 ¶¶ 37-38).

That the recorded date of Feldstein's Notice of Pendency was falsified is also made clear by the Suffolk County Real Property Tax Service Agency stamp affixed to the face of the Notice. That date again is handwritten. The handwritten date is "9/1/98." However, as provided in the Suffolk County Administrative Code, Article XVIII, verification of a Notice of Pendency by the Tax Agency and the payment of the applicable fee must *precede* the recording of the *lis pendens*. The fact that payment of the tax occurred *after* the purported recording date of the *lis pendens* again shows that the County Clerk falsely recorded the *lis pendens* (JA 24 ¶ 39).

As a result of the foregoing manipulation of recording and filing dates, Feldstein, with the assistance of the County Clerk, created the false impression that his Notice of Pendency preceded the transfer of title in the Premises to Ulysses, thereby placing a false cloud on Ulysses' title (JA 24 ¶¶ 40-41). In fact, however, Ulysses had obtained good title on August 25, 1998 and duly submitted the Deed for recording on or about August 28, 1998. The County Clerk improperly failed to record the Deed.

3. Respondents' Unlawful Exclusion Of Ulysses From The Property

In September 1998, at or about the time that the County Clerk finally recorded the Deed in Ulysses' name, Feldstein permanently vacated the Premises. He moved to Manhattan and thereafter relocated to California. However, despite due demand, and despite the fact that Ulysses had recorded good title to the Premises, Feldstein, directly and through his agents, refused to surrender possession of the Premises to Ulysses

(JA 24 ¶ 42). Instead, Feldstein conspired with Morton and his sister, the respondent Mara Gibbs ("Gibbs"), as well as others, to exclude Ulysses from the property and indeed to attempt to destroy the house on the property (JA 25 ¶ 43).

Thus, on or about March 8, 1999, without any disclosure to or permission from Ulysses, the title holder of record of the property, Morton filed with the Zoning Board of Appeals of the Village of East Hampton (the "Board") an Application for a Coastal Erosion Permit and an Application for a Building Permit in respect of the Premises (the "Applications"). At the time, Morton knew that Ulysses was the title owner of record of the Premises. However, in the Coastal Erosion Application, Morton, as the named Applicant, falsely represented that Feldstein was the Owner of the Premises. In the Building Permit Application, Morton declined to identify the owner of the Premises. Notwithstanding these omissions and false statements contrary to public record, the Village processed the Applications and, at Morton's request, scheduled an expedited hearing date. Ulysses discovered the Applications by sheer happenstance and prevented Morton from demolishing the house only by obtaining the intervention of the federal district court (JA 26 ¶¶ 47-48).

4. <u>The Unlawful Intervention Of The Village Police</u>

Since July 1, 1999, the Premises have been occupied by Morton and/or Gibbs or their attorney. During all this time, Ulysses has been denied all access to the Premises, and there has been no compensation whatsoever to Ulysses, even while Ulysses has remained the title holder of record and has continued to pay all taxes and utilities on the Premises. To make matters worse, Morton, Gibbs, Feldstein and their agents, including their various attorneys, allowed the house to fall into a state of dilapidation and actively prevented Ulysses from making the necessary repairs (JA 28 ¶¶ 54-55). In June 1999, Ulysses was denied access to the Premises to repair the fence around the pool, which was in violation of Code. Thereafter, the Building Inspector for the Village of East Hampton cited Ulysses, *as the owner of record*, for the Code violation and warned that Ulysses could have civil and criminal liability for

any resulting accident. It was only with the judicial intervention of the district court, at Ulysses' behest, that the fence was finally repaired in August 1999 (JA 29 ¶ 57).

Pursuant to the order of the district court, Ulysses then attempted to inspect the Premises for other possible hazardous conditions on August 17, 1999, but Ulysses' entry was blocked, at Morton's direction, in defiance of the court order. Thereafter, when a representative of Ulysses again attempted to enter the Premises for the purpose of inspection, Feldstein, Morton and Gibbs enlisted the unlawful assistance of the Village police. Gibbs filed a false complaint with the Village police for criminal trespass against Ulysses' representative. A member of the East Hampton police force, *whom Feldstein has expressly acknowledged was on his payroll*, was called to the Premises to prevent Ulysses' entry. At Gibbs' behest, the East Hampton police denied Ulysses access to the property and threatened its representative with arrest, *despite the fact that Ulysses was the title holder of record and so demonstrated to the police by presenting a copy of the Deed* (JA 30 ¶ 58).

5. <u>The Unlawful Judgment Of The State Court</u>

In March 1999, each of the parties in the state action moved for summary judgment declaring their rightful ownership of the Premises. By Decision and Judgment dated January 31, 2000, the state court granted Feldstein summary judgment, finding the Sales Contract between Rounick and Feldstein to be enforceable (despite Feldstein's renegotiation and unlawful assignment) and most inexplicably, finding Feldstein entitled to specific performance, despite all the evidence that in fact he was not "ready, willing and able" to close title on the scheduled closing date. (J-6).

However, even more remarkable than this Decision and Judgment was the refusal of the County Clerk to file it and his orchestrating instead the filing of a new and different judgment. Despite the fact that Justice D'Emilio had expressly directed on the face of the January 31 Decision and Judgment that it "shall constitute the Judgment and Decision of this

Court" (J-8), the County Clerk took it upon himself to reject the January 31 Judgment submitted for filing. He not only failed to file the Judgment, he crafted a new judgment, through *ex parte* communications with Feldstein's counsel. A Judgment dated February 8, 2000 was then secretly submitted for filing instead of the January 31 Judgment — *all without any notice to Ulysses*. (I-1).

Unlike the January 31 Judgment, the February 8 Judgment directed Ulysses to "execute all documents necessary to transfer to [Feldstein] good and marketable title to the property . . . free and clear of all encumbrances, on March 10, 2000" and, if Ulysses failed to do so, directed the Sheriff to execute a deed for the Premises. None of this relief was provided for in the January 31 Judgment. Furthermore, the February 8 Judgment failed to specify what payments were to be made to Ulysses for transferring title, for having paid the property taxes and utility bills or for having been denied use and occupancy while it was the title holder. Indisputably, this new judgment was entered in violation of Ulysses' right to due process and in violation of New York's statutory mandate, under CPLR 5016(c), that any judgment granting injunctive relief must be upon notice and motion.

Notwithstanding all of these grievous errors of law and irregularities in the Judgment itself, the February 8 Judgment was affirmed by the Appellate Division, Second Department, by Decision and Order dated October 10, 2000.[2]

6. <u>The Federal Complaint</u>

Ulysses filed its complaint herein in the United States District Court for the Eastern District of New York on February 1, 2000, and filed its amended complaint on April 6, 2000. Ulysses asserted claims against respondents Suffolk County,

---

[2] Subsequently, the February 8 Judgment was vacated by Order of the Honorable John J.J. Jones, Jr., Supreme Court, Suffolk County, entered May 14, 2001, by reason of the purposeful violation of CPLR 5016(c). *See* App. H-4, H-5. Presently, there is *no judgment* on file awarding Feldstein this property.

the County Clerk and the Village of East Hampton for deprivation of its property rights without due process and in violation of 42 U.S.C. § 1983. Ulysses also asserted pendent state claims against respondents Morton, Feldstein and Gibbs for (i) unlawful interference with its quiet possession and enjoyment of the property, (ii) intentional interference with contract, (iii) conversion of certain furnishings, (iv) conversion of certain rent monies, (v) slander of title, (vi) injunctive relief for surrender of the Premises and (vii) declaratory relief.

7. The Decisions Below

By decision dated August 1, 2000 (App. G), the District Court dismissed the case in its entirety, with prejudice, for lack of subject matter jurisdiction. The court determined that the issues and claims here were "inextricably intertwined" with those previously resolved by the February 8, 2000 state court judgment and that dismissal was therefore required under the *Rooker-Feldman* doctrine. The District Court also determined, under Fed. R. Civ. P. 12(b)(6), that Ulysses had failed to adequately state a claim under 42 U.S.C. § 1983, by failing to adequately allege that the misconduct attributed to the Village and County was the result of a "custom" or "policy" of the Village or County as distinct from merely aberrant acts of the police officers or county clerk (G-30).

The Court of Appeals affirmed, holding that (i) Ulysses' claims against the individual defendants are barred under the *Rooker-Feldman* doctrine, and (ii) Ulysses' claims against the municipal defendants were inadequate for failure to adequately allege a municipal policy or practice under § 1983 (A-3).

ARGUMENT

CERTIORARI SHOULD BE GRANTED, BECAUSE, IN DENYING PETITIONER THE PROTECTION OF FEDERAL LAW AS THE DULY RECORDED TITLE HOLDER OF REAL PROPERTY, THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE BUT HAS NOT BEEN SETTLED BY THIS COURT.

It is respectfully submitted that in affirming the district court's determination that it lacked subject matter jurisdiction over this action under the *Rooker-Feldman* doctrine, the Second Circuit failed to recognize certain fundamental and federally protected property rights enjoyed by title holders to real property that were in no way addressed or resolved by the state court judgment to which the district court deferred. By the petition, Ulysses asks this court to resolve those rights.

The Second Circuit determined, as did the district court, that the issues and claims here were "inextricably intertwined" with those previously resolved by the state court judgment. The state court had determined, in January 2000, that Feldstein's contract to purchase the property was enforceable and that Ulysses must therefore convey title to Feldstein — but the state court did not determine or even address what rights Ulysses enjoyed as the duly recorded title holder between September 1998 and the court's determination of ownership in January 2000. That was the issue raised by the federal complaint.

Ulysses submits that crucial federally protected rights attach to a deed, which reside with the deed holder. These rights include, among others, the right to police protection, voting rights, access to public schools and public utilities, beach use rights and the right to apply for land use permits. These rights are and must be a matter of objeetive entitlement, represented by the recording and, if necessary, the presentment of a deed, until a court of competent jurisdiction may determine that

someone other than the deed holder is the rightful owner of the property. Here, that determination was not made until more than 16 months after Ulysses recorded its deed and paid for the property.

If the deed holder to residential property is not entitled to the full protection of the law as a homeowner until a court may determine that he must relinquish title, how are third parties to know whom they should treat as the homeowner? How are the police to know who they should answer to in protecting the property? How is the Village to know who it should allow to apply for building permits? How are the utilities to know who they should allow to apply for service or for the discontinuance of service? How are local authorities to determine who is a resident for purposes of voting, schooling, or gaining access to a host of public facilities — including the courts? A deed is supposed to resolve these questions in favor of the deed holder until a court may determine otherwise.

Thus, the issue in this case is not whether the state court judgment was correct and should be followed, as the courts below erroneously determined, but rather whether prior to that judgment directing Ulysses to surrender the property Ulysses was denied certain federal rights as the duly recorded title holder and taxpayer on this property which exist separate and apart from that judgment. That is what this case is about, and the issue is of great significance. None of these entitlements of a deed holder was addressed by the state court. The courts below therefore had the necessary jurisdiction to do so and erred in dismissing this action under Rule 12(b)(1) by reason of *Rooker-Feldman*.

Secondly, the courts below erred in dismissing this action under Fed. R. Civ. P. 12(b)(6) for failure to adequately state a claim under 42 U.S.C. § 1983. The courts below determined that Ulysses had failed to adequately allege that the misconduct attributed to the Village and County was the result of a "custom" or "policy" of the Village or County as distinct from merely aberrant acts of the officers or clerk. As shown below, however, the adequacy of the claim is not to be determined by semantics or the invocation of any particular terminology.

The claim is sufficient if conduct is alleged from which a custom or policy violative of the plaintiff's civil rights can reasonably be inferred. Here Ulysses alleged a *repetition* of violations from which such a custom or policy could readily be inferred. Dismissal was, therefore, improper, at least without leave to amend. It is imperative that such cases not be readily dismissed with prejudice if 42 U.S.C. § 1983 is to serve its intended purpose.

1. The Courts Below Erred in Dismissing The Action Under Rule 12(b)(1)

The Second Circuit affirmed the district court's dismissal of this case for lack of subject matter jurisdiction based on its interpretation of the "Rooker Feldman" doctrine, derived from the cases of *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed.2d 206 (1983). In so deciding, the Second Circuit cited its decision of *Moccio v. New York State Office of Court Administration*, 95 F.3d 195 (2d Cir. 1996). However, even under this authority of its own, *Rooker-Feldman* would not apply.

In *Moccio* the Second Circuit stated as follows (at 197-198):

> The so-called Rooker-Feldman doctrine, generally stated, is that inferior federal courts have no subject matter jurisdiction over cases that effectively seek review of judgments of state courts . . . [T]o the extent that plaintiff's claims [are] "inextricably intertwined" with the state court's determination, the federal district court does not have jurisdiction.

In determining whether the federal claims are "inextricably intertwined" with the state court judgment, the Court in *Moccio* looked to Justice Marshall's concurring opinion in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S.1, 24-26, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987):

> The federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.

Here, the district court and the Second Circuit failed to apply this standard. The Second Circuit was *not* asked by Ulysses to decide that the state court had wrongly decided any issues before it. No such determination is needed for Ulysses to prevail on its claims in this action. While the state court determined (however erroneously) that Feldstein is now entitled to have this property conveyed to him, the state court was not asked to and did not make any determination as to what rights belonged to Ulysses during the time that it had been the duly recorded title holder of the property. Certainly, the state court made no determination that Ulysses had not been the title holder, and certainly the state court made no determination that Ulysses had no rights as the title holder.

Thus, the Second Circuit ruled as it did, because it determined that it was being asked to "review Justice D'Emilio's [state court] decision" (A-3), but that simply was not so. In fact, the district court recognized that that was not so. Judge Hurley stated (G-30):

> To the extent that the conduct [complained of] is said to predate the determination by Justice D'Emilio, *arguably the Court may have subject matter jurisdiction* but that's an argument that doesn't have to be addressed or resolved. (Emphasis added).

In fact, virtually all of the conduct complained of herein predated the state court determination of ownership. While the courts below declined to determine whether this conduct violated Ulysses' federal rights as the title holder, it is respectfully submitted that this Court should now do so.

Thus, the courts below did not resolve the fundamental issue of whether a duly recorded deed holder to residential property enjoys certain protections of federal law while he is the deed holder even if a court should later determine that his rights in the property are inferior to another's and that he must

therefore convey title. If the state court decision here is deemed to have resolved that issue (without actually addressing it) retroactively, then implicit in the Second Circuit's ruling is that the police, the Village, the County, all third parties and indeed Ulysses itself must be able to anticipate the state court judgment awarding ownership to Feldstein for months or even years before it is rendered and that, in the interim, Ulysses' deed can be disregarded with the benefit of that foresight. Surely, the law does not impose such an impossible burden, the irrationality of which is only underscored where, as here, the anticipated state court judgment is itself later vacated.

It is evident too that in purporting to follow its prior decision in *Moccio*, the Second Circuit also overlooked its own instruction in *Moccio* (at 200) that "we decide whether the Rooker-Feldman doctrine applies . . . by turning to preclusion principles."

The Second Circuit had observed in *Moccio* that "the law of preclusion can be divided into two branches: *res judicata* (claim preclusion) and collateral estoppel (cause preclusion)." *Id.* As to collateral estoppel, the Court stated:

> Under New York law, collateral estoppel will apply only if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*

Certainly, the issue in question here was *not* decided in the prior state court proceeding. Accordingly, there can be no preclusion under the principles of collateral estoppel.

The same result follows from the principles of *res judicata*. Under New York law, the doctrine applies only to bar future litigation between *the same parties* on the *same causes of action*. *E.g.*, *Gill v. New York State Board of Law Examiners*, 166 F.3d 1200 (2d Cir. 1998). In this case, the cause of action under 42 U.S.C. § 1983 had never been previously asserted. Significantly, too, neither the Village nor the County nor the County Clerk, against whom the cause of action was asserted

here, was a party in the state court action. Accordingly, there can be no preclusion under the principles of *res judicata*.

Thus, the issues and claims presented to the courts below were never previously litigated and therefore could not be precluded. The injuries alleged in these claims do not arise from the adverse state court judgment but rather arise from various wrongs prior to and independent of that judgment.

Count One in this action asserts violations of Ulysses' constitutional rights, right to due process and civil rights under 42 U.S.C. § 1983 by the County, County Clerk and Village of East Hampton, by reason of their various unlawful acts alleged in the Amended Complaint which deprived Ulysses of its right to fairly partake in the process of asserting, recording, protecting and enjoying its property interest. This claim was never presented in state court. The fact that the state court determined in February 2000 that the Premises should be conveyed to Feldstein does not mean that Ulysses never had any rights as the title holder to that property. In fact, a deed has always conferred certain rights on its holder, which may be extinguished by a judicial determination but are certainly not suspended pending that determination or retracted upon its deliverance.

Thus, under New York law there is always the "presumption that the record title owner of the premises is in fact the owner of the property." *Banks v. Banks*, 121 A.D.2d 421, 503 N.Y.S. 2d 119 (2d Dep't 1996). That presumption entitles the owner of record to the protection of law as against any occupants or other third parties, until title is transferred, either voluntarily or by judicial compulsion. E.g, *City of Tonawanda v. Ellicott Creek Homeowners Association*, 86 A.D.2d 118, 449 N.Y.S. 2d 116, 119 (4th Dep't 1982) ("Legal title carries with it the presumption that the record owner has been possessed of the premises and that the occupation by another is subordinate"); *Roxbury Light & Power Co. v. Dimmick*, 196 N.Y.S. 320 (Cty. Ct. Del. Co. 1922) (any party other than the title holder is presumed to be a trespasser if entering upon property over title holder's objection).

Although there is virtually no authority elaborating on the implications of this presumption of law, certainly the logic is evident. If a deed is not dispositive of property rights until a court may finally determine otherwise, how can the police or the local authorities or any third parties make any determination as to who is entitled to be treated as the property owner? Any other rule invites chaos. It leaves such determinations to be governed by persuasion or patronage, rather than by public filings. It requires the police and others to make their own legal judgments, indeed to be judges or, at the very least, to predict how judges will resolve competing claims of ownership. Third parties, including the police, must have an objective rather than subjective basis for making such determinations, and historically a deed, in the absence of a final court order, has been that basis. It is respectfully submitted that this Court should now confirm that.

Here, Ulysses had the right to have its deed duly recorded when presented to the County Clerk's office in August 1998. The County Clerk's denial of that right and unreasonable failure to record title until nearly a month after that cannot be excused by the fact that some seventeen months later a state court determined that title must be conveyed to Feldstein. Nor can that decision excuse retroactively the fact that the County Clerk accepted for filing a *lis pendens* for Feldstein with a filing date that was indisputably falsified. Nor can the state court decision absolve the County Clerk from the denial of due process in his *ex parte* communications with Feldstein's counsel and collaboration in secretly substituting a new judgment for the January 31 Decision and Judgment which the state court judge had expressly intended to be the Decision and Judgment of the court. Where is the legal authority for this extraordinary *ex parte* procedure? Where is the authority for the County Clerk to reject the determination of the court that the January 31 Decision and Judgment was to be the judgment of the court? Count One seeks to impose liability on the County and County Clerk for this pattern of extra-judicial denial of due process.

Likewise, the state court determination in February 2000 cannot spare the Village from liability for allowing its police to repeatedly and improperly bar Ulysses from the Premises while Ulysses was still the duly recorded title holder and the taxpayer on that property. The fact that the state court later determined that Ulysses must surrender title does not mean that Ulysses never had any rights of access as the title holder. Yet the Village police at all times actively intervened to deny those rights. Indeed, the Village police were improperly and unlawfully privatized by Feldstein, who admitted to making personal payments to at least one member of the Village Police Department who was summoned to exclude Ulysses from the property at Feldstein's behest while purporting to act in an official capacity. Plainly, there was an illicit arrangement between Feldstein and Morton on the one hand, and the Village police on the other, which victimized Ulysses. It is this corruption and pattern of unlawful intervention to the detriment of the title holder which is the basis for Count One against the Village and can in no way be excused by the February 8 Judgment.

In addition, the Village violated Ulysses' property rights by proceeding with Morton's Applications for permission to demolish the house on the Premises without even notifying Ulysses, even while Ulysses indisputably was the title holder of record. Again, the February 8, 2000 Judgment cannot retroactively legitimize that impropriety in March 1999. In entertaining Morton's Applications, the Village completely disregarded and denied Ulysses' rights as the owner of record to save its own property from demolition. In was in fact only with the intervention of the district court in June 1999 that the process of obtaining permission for demolition was interrupted. The Village should not be permitted to disregard the rights of Ulysses as title holder of record by entertaining an application which, remarkably, would allow a stranger to the property, such as Morton, to completely destroy the property. Count One seeks to hold the Village liable for that denial of Ulysses' property rights.

None of the foregoing claims was asserted, resolved or implicated in the state court proceeding. There was no determination by the state court that Ulysses did not enjoy any of the foregoing rights *while it was the title holder*. Accordingly, the federal courts are in no way precluded by reason of the state court's decision or judgment from entertaining these claims. *See Hughes v. City of Albany*, 189 F.3d 461 (2d Cir. 1999) ("Since [plaintiff's] present claims do not seek to relitigate state court judgments in federal court, the *Rooker-Feldman* doctrine does not deprive us of jurisdiction").

2. The Second Circuit Erred In Dismissing The Amended Complaint Under Rule 12(b)(6)

Apart from its ruling under Fed. R. Civ. P. 12(b)(1), the Second Circuit also determined, in the alternative, that the case should be dismissed under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. The Second Circuit ruled that Ulysses had failed to adequately state a claim against the Village or County under 42 U.S.C. § 1983, because Ulysses had failed to adequately allege a "practice" or "custom" or "policy" of the Village or County to engage in the conduct complained of.

However, the law does not require this specific allegation. Rather, the Second Circuit itself has acknowledged that it is enough to allege facts from which such a practice, custom or policy may reasonably be inferred. *See Pangburn v. Culberston*, 200 F.3d 65, 71 (2d Cir. 1999) (§ 1983 claim sustained where a policy of failing to adequately train employees of Sheriff's Department to respect property rights of car owners could be inferred from their acts of indifference to those rights); *Ricciuti v. New York City Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991) (the inference that a policy violative of §1983 may arise from "circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction"); *Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995).

Furthermore, this Court has determined that the custom, practice or policy actionable under § 1983 need not be anything formal if it is reflected in continuing conduct. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (municipality can be liable under § 1983 for acts of its police officers where the acts reflect a failure to properly train the police officers); *See also, Serlucco v. New York City Police Department*, 971 F.2d 864, 870 (2d Cir. 1992) (applying standard to § 1983 claim against police department); *Pangburn v. Culberston, supra*, 200 F.3d at 71 (§ 1983 plaintiff "need not show that the policy was engraved in an explicitly adopted rule or regulation.").

Under these criteria, Ulysses made the necessary allegations. Ulysses alleged the existence of a practice by the County Clerk's office of manipulating, altering and/or failing to properly file critical public documents. As set forth in the Amended Complaint (JA 23 ¶¶ 35-36), in the first of three separate (but not unrelated) events, the County Clerk unlawfully and without cause rejected Ulysses' Deed in August 1998 and failed to record the deed until nearly a month later. Thereafter (as alleged in paragraphs 37-39 of the Amended Complaint) (JA23-24), the County Clerk improperly accepted for filing a Notice of Pendency from Feldstein with a filing date of August 31, 1998, which was plainly falsified. In doing so, the County Clerk created the false impression that Feldstein's Notice of Pendency preceded the transfer of title in the Premises to Ulysses, thereby placing a false cloud on Ulysses' title and assisting Feldstein in his interference with Ulysses' property rights.

Finally, the County Clerk's *practice* of improperly recording documents is further demonstrated in the allegations concerning the filing of the judgment itself. Ulysses alleges (and the state court itself later held, in vacating the February 8, 2000 Judgment) that the judgment was entered in violation of due process and, more particularly, in violation of CPLR 5016(c), as a result of *ex parte* communications between the

County Clerk and Feldstein's counsel. The County Clerk rejected the filing of the January 31 Decision and Judgment, even though it was expressly intended by the court to be its Decision and Judgment, and instead accepted a substituted judgment secretly drafted and submitted by Feldstein's counsel. The County Clerk then certified a document as the judgment on file, even though it is different from the judgment actually on file (JA 454-458, 601-603). The County Clerk signed his own signature to the judgment on file (and then whited it out) and placed several different time stamps on the judgment, some of which are again whited out or altered in ink. *Id.*

Thus, Ulysses has indeed alleged a pattern and practice of wrongful filings by the County Clerk, which directly resulted in the impairment of Ulysses' property rights. Such a practice is actionable under § 1983. *See LeGrand v. Evan*, 702 F.2d 415, 417-18 (refusal by court clerk to accept papers for filing may be a deprivation of constitutional rights actionable under §1983).

Likewise, Ulysses alleged a series of events from which it can reasonably be inferred that the Village has an unlawful custom or policy of failing to protect the property rights of title holders and taxpayers in the Village merely because they are not in possession of their property. Among these allegations are the following:

1. The Village processed Morton's applications for permission to demolish the Premises and scheduled an expedited hearing thereon despite the fact that Ulysses, rather than Morton, was the title holder of record to the Premises at the time. JA 26 ¶47.

2. The Village police repeatedly denied Ulysses access to the property, at the behest of Feldstein, Morton and Gibbs, despite the fact that Ulysses was the title holder of record and so demonstrated to the Village police by producing a copy of the Deed. JA 30 ¶ 58, JA 428-431.

3. The Village allowed Feldstein to deny Ulysses access to its property with the assistance of a uniformed police officer who was privately paid by Feldstein. JA 30 ¶ 58.

4. After denying Ulysses access to the property, which Ulysses sought in order to comply with Code and make necessary repairs, the Village cited Ulysses, as the owner of record of the Premises, for violations of Code and threatened to hold Ulysses civilly and criminally liable for those violations. JA 29 ¶ 57.

These acts reflect an unlawful *custom* or *policy* by the Village to deny the protection of law to dispossessed but duly recorded title holders of property in the Village. They further reflect a *practice* of allowing for the privatization of its police force adversely to the property interests of such title holders. JA 30 ¶58, JA 428-431, 615-616.

Thus, there was no basis to dismiss the claims under 42 U.S.C. § 1983. It is respectfully submitted that if § 1983 is to serve its intended purpose, this Court must clarify that it is not the language but rather the content of the allegations which determines the sufficiency of claims thereunder. If the Second Circuit believed that a "custom," "practice" or "policy" must be expressly alleged, leave to amend should have been granted to add this language, which was already implicit in the allegations. Dismissal without leave to amend was reversible error.

CONCLUSION

For the foregoing reasons, it respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
July 17, 2001

Respectfully submitted,

MARC S. DREIER
Counsel of Record
DREIER & BARITZ LLP
499 Park Avenue
New York, New York 10022
(212) 328-6100

Counsel for Petitioner
Ulysses J & Company, Inc.

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Eighteenth day of April, Two Thousand One.

PRESENT: HON. JOSEPH M. McLAUGHLIN,
HON. FRED I. PARKER,
HON. CHESTER J. STRAUB,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED APR 18 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

NO. 00-9189

ULYSSES I & COMPANY, INC.,

Plaintiff-Appellant,

– v. –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants-Appellees.

APPEARING FOR APPELLANT: Marc S. Dreier, Dreier & Baritz LLP, New York, New York

APPEARING FOR APPELLEE: Errol Margolin, Margolin & Pierce, LLP, New York, New York; Mathew E. Pachman, Pachman & Pachman, P.C., Commack, New York; Kevin L. Smith, Stroock & Stroock & Lavan, New York, New York; Theodore Sklar, Bureau Chief, General Litigation Suffolk County, Hauppauge, New York

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Ulysses I & Company, Inc. ("Ulysses") appeals from the judgment of the United States District Court for the Eastern District of New York (Hurley, J.) entered on September 11, 2000, dismissing Ulysses' complaint, asserting claims under 42 U.S.C. § 1983 and pendent state claims, in its entirety. The district court granted the motions of Peter Morton, Gary Feldstein and Mara Gibbs (collectively "the individual defendants") and dismissed the claims against them pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine. The district court granted the motions of the Village of East Hampton, Suffolk County (collectively "the municipal defendants") and Edward P. Romaine as Clerk of Suffolk County and dismissed the claims against them pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

This dispute involves, at its center, a parcel of real property located in East Hampton, New York. Prior to the action in the Eastern District of New York, Justice Gerald D'Emilio, of the New York Supreme Court, Suffolk County, determined that Ulysses was required to convey this property to defendant Feldstein, having determined that Feldstein was entitled to specific performance of a contract for the sale of this property. Justice D'Emilio rejected Ulysses' counterclaims against Feldstein.

Under the so-called *Rooker-Feldman* doctrine, because only the United States Supreme Court can entertain an appeal to reverse or modify a state court decision, if a plaintiff's claims are "inextricably intertwined" with a state court's determinations, a federal district court is without jurisdiction to hear those claims. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) and *Feldman v. District of Columbia Court of Appeals*, 460 U.S. 462, 482-84 n.16 (1983)). We affirm the district court's conclusion that Ulysses' claims against the individual defendants are barred under the *Rooker-Feldman* doctrine, because these claims all require, at least in part, a determination that Ulysses has property rights in the premises at issue. As such, an adjudication of these claims would necessitate review of Justice D'Emilio's decision, which is plainly prohibited by *Rooker-Feldman*.

The district court's dismissal of the 42 U.S.C. § 1983 claims against the municipal defendants was also proper. To demonstrate municipal liability under § 1983, a plaintiff must prove the existence of a municipal policy, practice or custom that is the cause of the plaintiff's injury. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Such a policy may be inferred from circumstantial proof, but the mere assertion that a municipality has such a policy is generally insufficient to support such an inference. *See Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993). "A single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy." *Id.* The district court concluded, and we agree, that the allegations in the complaint concerning the municipal defendants fail to state a claim under § 1983 because they allege no municipal practice or policy.

We have considered Ulysses' remaining arguments and find them to be without merit.

Appellees Morton and Gibbs have moved for sanctions against Ulysses pursuant to Fed. R. App. P. 38, which provides that "[i]f a court of appeals determines that an appeal is

frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." We hereby DENY this motion.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
Lucille Carr, Operations Manager

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT
CV 00-0654 (DRH)

FILED IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
SEP 13 2000

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Orders of Hon. Denis R. Hurley, having been filed on August 11, 2000, granting defendants PETER MORTON, MARA GIBBS, and INCORPORATED VILLAGE OF EAST HAMPTON's motions to dismiss the plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6); and an Order of Hon. Denis R. Hurley, having been filed on August 15, 2000, granting defendant STATE OF NEW YORK's motion to dismiss plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12 (b)(1); and an Order of Hon. Denis R. Hurley, having been filed on August 16, 2000, granting defendants GARY FELDSTEIN, SUFFOLK COUNTY, and EDWARD P. ROMAINE, as Clerk of Suffolk County's motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6), it is

ORDERED AND ADJUDGED that plaintiff ULYSSES I & COMPANY, INC. take nothing of defendants PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and

EDWARD P. ROMAINE, as Clerk of Suffolk County; and that the Amended Complaint is hereby dismissed in its entirety.

Dated: Central Islip, New York
September 11, 2000

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 Civ. 0654 (DRH)

ORDER

ULYSSES I & COMPANY, INC.,

Plaintiff,

v.

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Defendant Dr. Feldstein having moved to dismiss this action against him pursuant to the provisions of FRCP 12(b)(1) and (6) and plaintiff having opposed such motion and applied to amend its first amended complaint and the parties having appeared before me by their respective counsel on August 1, 2000 and been heard and due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED:

1. The said motion of defendant Dr. Gary Feldstein to dismiss this action is granted pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction and additionally pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted; and

2. Plaintiff's application to amend its first amended complaint is hereby denied.

SO ORDERED.

Dated: Hauppauge, New York
August 16, 2000

/s/ Denis R. Hurley
U.S.D.J.

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

Case No. 00 Civ. 0654
Judge Denis R. Hurley

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Defendants, Suffolk County and Edward P. Romaine, as Clerk of Suffolk County, having moved to dismiss the plaintiffs' amended complaint against them pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and the parties having appeared before the Court by their respective counsel on August 1, 2000 to be heard and the Court, upon consideration of the submissions by the parties and upon due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED, that the motion by the defendants Suffolk County and Edward P. Romaine, as Clerk of Suffolk County, to dismiss the plaintiffs' amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted is hereby granted and the amended complaint against those defendants is hereby dismissed.

SO ORDERED.

Dated: Hauppauge, New York
August 16, 2000

/s/ Denis R. Hurley
Denis R. Hurley
United States District Court Judge

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 Civ. 0654 (DRH)
ORDER

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

On August 1, 2000, this Court considered the motion of defendant, Incorporated Village of East Hampton, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the amended complaint, as against the Incorporated Village of East Hampton, (to wit: count one, which alleged a violation of 42 U.S.C. §1983; and count two which sought a declaratory judgment that all determinations in respect of ownership, access and control over the Premises shall heretofore be made by this court and the federal government and not the state and local governmental defendants) for failure to state a claim upon which relief can be granted against it.

The Court examined memorandums of Law submitted in support of, and opposition to, the motion, and heard and considered the arguments of counsel for plaintiff, Ulysses I, and the defendant, The Incorporated Village of East Hampton, and after due deliberation, and for the reasons set in its oral decision spread upon the record on August 1, 2000, it is hereby,

ORDERED, ADJUDGED & DECREED, that defendant, Incorporated Village of East Hampton's motion for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the amended complaint, as to all counts therein alleged against the Incorporated Village of East Hampton for failure, of the plaintiff, to state a claim against the Incorporated Village of East Hampton, upon which relief can be granted against it, is, in all respects, granted.

Dated: August 11, 2000
Hauppauge, New York

/s/ Denis R. Hurley
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No. 00 Civ. 0654
(DRH)

Order

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Defendants Peter Morton and Mara Gibbs having moved to dismiss this action against them pursuant to the provisions of FRCP 12(b)(1) and (6) and plaintiff having opposed such motion and applied to amend its first amended complaint and the parties having appeared before me by their respective counsel on August 1, 2000 and been heard and due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED:

1. the said motion of defendants Peter Morton and Mara Gibbs to dismiss this action is granted pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction and additionally pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted; and

2. plaintiff's application to amend its first amended complaint is hereby denied.

SO ORDERED.

Dated: Hauppauge, New York
August 11, 2000

/s/ Denis R. Hurley
U.S.D.J.

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ULYSSES I & COMPANY,	X	CV-00-654
Plaintiff,	:	
– against –	:	U.S. Courthouse Hauppauge, New York
PETER MORTON, et al,		
Defendants.	:	August 1, 2000
	X	11:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENIS R. HURLEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

DREIER & BARITZ
499 Park Avenue
New York, NY 10022
BY: MARC DREIER, ESQ.

And

SEAN F. O'SHEA, ESQ.
405 Lexington Avenue
New York, NY 10174

For the Defendants:

MARGOLIN & PIERCE
1370 Avenue of the Americas
New York, NY 10019
BY: PHILIP PIERCE, ESQ.
ERROL MARGOLIN, ESQ.
For Defendants Morton and Gibbs

STROOCK & STROOCK & LAVAN
180 Maiden Lane
New York, NY 10038
BY: KEVIN L. SMITH, ESQ.

For Defendant Feldstein

PACHMAN & PACHMAN
366 Veterans Memorial Highway
Commack, NY 11725
BY: MATTHEW PACHMAN, ESQ.
HOWARD PACHMAN, ESQ.

For the Village of East Hampton

SUFFOLK COUNTY ATTORNEY'S OFFICE
100 Veterans Memorial Highway
Hauppauge, NY 11788
BY: THEODORE D. SKLAR, ESQ.

For Suffolk County

Court Reporter: MARY ANN STEIGER
300 Rabro Drive
Hauppauge, New York 11788
(516) 582-1120

Proceedings recorded by mechanical stenography, transcript produced by computer.

---

[3]

THE CLERK: Calling civil case number 00-654, Ulysses I & Company -v- Peter Morton, et al.

Will counsel note their appearances, please.

MR. PIERCE: If your Honor please, Philip Pierce, speaking for the defendants Morton and Gibbs.

THE COURT: Good morning, Mr. Pierce.

MR. MARGOLIN: Errol Margolin, for the defendants Morton and Gibbs.

THE COURT: Good morning, Mr. Margolin.

MR. SMITH: Kevin Smith, for the defendant Dr. Gary Feldstein.

THE COURT: Good morning, Mr. Smith.

MR. PACHMAN: Good morning, your Honor. Matt Pachman, for the defendant Incorporated Village of East Hampton.

THE COURT: Good morning, Mr. Pachman.

MR. SKLAR: Theodore Sklar, for the defendants Suffolk County and Edward Romaine, Suffolk County Clerk.

THE COURT: Good morning, Mr. Sklar.

MR. DREIER: Your Honor, Marc Dreier with Sean O'Shea, for the plaintiff Ulysses I & Company.

THE COURT: Good morning.

We have a number of motions on today. Firstly, there was a motion made by the defendant State of New York, and I understand that that motion is unopposed and

[4]

the plaintiff consents to the dismissal.

In addition, there's a motion on behalf of the defendants Morton and Gibbs to dismiss. Also, there's a motion by Morton and Gibbs which seeks sanctions against plaintiff and plaintiff's counsel.

There's also a motion to dismiss brought on behalf of Dr. Feldstein, and there's a second or further motion by that moving defendant which seeks that the Court enter an order which would preclude further suits or actions being brought in this Court concerning the subject property.

There's a motion to dismiss by the Village of East Hampton, and there's also an application by plaintiff to amend the complaint.

So, against that backdrop, firstly, I will note that I have read the papers. I think the issues are well framed, so I would prefer not to simply hear what's already in the papers.

But I do have one question of Mr. Dreier. You indicate that in the proceeding in the Supreme Court that you were denied an opportunity to be fully heard on the issues that underlie this action and it's your thought that, because of that, the doctrine in collateral estoppel may not be legitimately invoked.

How were you deprived of an opportunity to be

[5]

heard on some of these issues?

MR. DREIER: Your Honor, first and foremost, we were deprived of an opportunity to participate in the framing of the judgment. The judgment was issued without notice pursuant to ex parte communications between defense counsel in this case. Mr. Feldstein was the plaintiff in that proceeding. The discussions were between counsel, between the County Clerk's Office and between the law clerk for Justice D'Emilio.

Rule 5016(c) under the CPLR provides we're entitled to notice on motion for judgment that affects injunctive relief.

That was clearly the case here. Not only were we never notified of the form of the judgment, we were never apprised of the terms that the judgment would have because the judgment differed at least in one or two key respects from the decision which had been entered.

The decision which was dated January 31, 2000, on its face said that this is to be the decision and judgment of the Court.

Evidently, as we understand now from counsel for respective defendants here, that judgment was rejected sua sponte, for lack of a better word, by the County Clerk's Office without notification to us, and evidently the County Clerk took it upon himself to determine, even

[6]

though Justice D'Emilio said that that was to be his decision and judgment, the County Clerk determined that it would not be the judge's decision and judgment and rejected the judgment without informing us.

We now know from Dr. Feldstein's counsel that he engaged in ex parte communications with the County Clerk and with Mr. Brunjes, Justice D'Emilio's law clerk, in secret, without notifying us, drafted and submitted a new form of a judgment which was then mailed to us.

That's the judgment evidently that was first submitted to the County Clerk's Office, although I note even today the judgment that's on file with the County Clerk is different from the judgment which has been presented to your Honor and the judgment that was presented with notice of entry to us.

THE COURT: What did Justice D'Emilio say about this problem that you outlined concerning the judgment, his original decision, which was a decision and order and he wants that to be entered, the County Clerk refused to accept it for entry, then there was another judgment that was prepared and that you referred to. What does Justice D'Emilio say about this?

MR. DREIER: I don't know, your Honor. There was another judgment that was prepared and filed and sent to us after the fact. There was never any opportunity before

[7]

that or in connection with that to appear before Justice D'Emilio.

THE COURT: Why not? When you received the judgment which differed from the judge's decision of 1/31/2000, why didn't you simply call up and point out that under the CPLR this judgment should have been settled on notice with you and you want to be heard on it?

I assume you did that; but, firstly, did you do it? And if not, why not?

MR. DREIER: Well, we certainly called chambers. It was the practice of Justice D'Emilio never to speak to me on the telephone for any reason whatsoever, nor to allow any communication other than by formal motion. I was told on all occasions nothing would be sent to me or discussed with me other than by formal application. All of our efforts to contact Justice D'Emilio were treated in a different fashion.

Evidently and quite clearly from the contacts made on behalf of counsel for Dr. Feldstein and Mr. Korton, evidently they had quite broad lines to seek ex parte communications with the County Clerk's Office and with Justice D'Emilio's law clerk.

That's not a small matter. We were frustrated at every turn to find out how things occurred, when things occurred. We even called Mr. Smith and asked him, because

[8]

Justice D'Emilio's law clerk would not tell me how it occurred. He literally hung the phone up on me.

I called Mr. Smith and asked how did this occur. Mr. Smith refused to answer my question. I said what was the procedure by which all of a sudden we had a January 31 decision and judgment and now we have a February 8th judgment with no notification. What happened? Did you make an application? Did you communicate with chambers? He said I won't answer.

THE COURT: I don't need this type of detail. This is referred to in your papers. That's one area where you indicate that in your judgment you were not provided with an appropriate opportunity to be heard in the State Court and, therefore, the doctrine of collateral estoppel is not applicable here.

Are there any other ways in which you were prevented from having a full and fair opportunity to be heard?

MR. DREIER: Yes, your Honor. The argument is twofold. The test is to have a full and fair opportunity to be heard and a valid judgment.

The case law which we cited to the Court said in order for a judgment to be accorded collateral —

THE COURT: That isn't my question. That's very nice if you would like to point that out to me, but I

[9]

asked you a very specific question, and the question was in what particulars were you denied an opportunity to be properly heard in the Supreme Court of the State of New York.

You indicated one instance regarding the judgment. My question is are there any other items before we get into the question of the validity of the judgment?

MR. DREIER: Yes, your Honor. We feel we should have had an opportunity to be heard orally. We were never given an audience with Justice D'Emilio.

In fact, to this day, none of the counsel for Ulysses has ever had the opportunity to see Justice D'Emilio on any motion submitted before him. We asked for a conference, we asked for oral argument. All of those applications were denied. Even though we thought there were extraordinary circumstances and irregularities to the procedure and indicated we would like to appear before the Court, we were never given an opportunity to appear before Justice D'Emilio with respect to any of these motions.

THE COURT: Did you avail yourself of the opportunity to make a formal motion before Justice D'Emilio on this question?

MR. DREIER: On the question of what, your Honor?

[10]

THE COURT: What you perceive to be the irregularities in the judgment?

In other words, you said he won't talk to you on the phone, you can't have a conference. You said he required formal application.

My question is what formal application, if any, did you make to Justice D'Emilio to address what you perceived to be a wrong?

MR. DREIER: I may have been misunderstood. What I was referring to is we were denied the opportunity to be heard on the motion for summary judgment and the related motions which were determined by their judgment, not on the judgment itself.

THE COURT: You were not granted oral argument?

MR. DREIER: Correct.

THE COURT: You were permitted to submit papers as well as reply papers and so forth?

MR. DREIER: Yes, your Honor. Finally, we brought to the attention of Referee Araujo, who was about to oversee the discovery process, that there were certain documents which we felt we were entitled to see.

One of the key documents was a document called an agreement to assign and assume entered into between Dr. Feldstein and Mr. Morton, and a second document was a

[11]

lease for the property entered into between Dr. Feldstein and Mr. Morton.

We were denied the opportunity to see those documents by Referee Araujo. Nevertheless, Justice D'Emilio made the determination that the agreement to assign and assume — which we didn't see in full, we saw only the first part of it — it was amended several times. The amendments were produced to us in redacted form. We felt that we should have the opportunity to see the full document.

Justice D'Emilio made the decision that the document was not effectively an assignment notwithstanding the fact that we never saw the full document, and as we understand it he never saw the full document or at least he did not comment on whether or not the full document had been presented to him.

THE COURT: Mr. Dreier, was that point raised to the Appellate Division Second Department?

MR. DREIER: Yes, your Honor.

THE COURT: I assume there's no decision from the Second Department as yet?

MR. DREIER: No. Argument, I understand, will be heard in the first week of September, your Honor.

THE COURT: Thank you, Mr. Dreier.

Now, again, there are extensive papers here. I

[12]

don't see any constructive purpose in going over what's in the papers. If anyone feels that there's something they neglected to put in by inadvertence or something just surfaced, I'll be happy to hear them. Otherwise, I will make the necessary bench decisions based on the submissions of counsel, which I know, parenthetically, are very thorough and well crafted on both sides as far as their respective positions are concerned

MR. PIERCE: If your Honor please?

THE COURT: Yes, sir.

MR. PIERCE: Counsel indicated that Referee Araujo, appointed by the State Court to govern discovery proceedings, I might add, at counsel's request, determined which papers would be admissible and which would be redacted and which were not.

This is one of the reasons for our motion for sanctions, using this Court to get what the State Court refused to give him. Counsel had those papers. This Court allowed discovery to those documents.

I understand that the only redaction was of an amount of consideration for, and that the legal effect of the paper was not withheld from counsel at all. I believe the complaint, as with many of the complaints, is spurious, sir.

THE COURT: Mr. Pierce, with respect to

[13]

Mr. Araujo and there was a request for documents that pertained to this assignment and lease, is that what it was?

MR. PIERCE: Yes, sir.

THE COURT: At some point it's your understanding that Mr. Dreier has seen both those documents, all the documents?

MR. PIERCE: I think counsel is better equipped to answer that.

MR. SMITH: The critical document was the contract of sale and the initial document with Morton. Those were fully produced.

What they're talking about is subsequent documents that continue the relationship with Morton that were totally irrelevant to the critical issue of whether or not there was a breach of a contract, and so the State Court had that argument. They can raise it on appeal.

Just to answer the question that Mr. Dreier didn't answer, which is did they make a motion to set aside the judgment, which they could have under CPLR 5015, relief from judgment or order, they didn't.

In their appeal brief, point three, they say the Court below failed to comply with 5016(c). What's that section? The failure to entertain a judgment on motion. They got it in front of the Appellate Division Second

[14]

Department.

I must point out to you that under 5019, which is validity and correction of judgment or order, it says a judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers unless a substantial right of a party is affected.

The judgment conforms with the decision. On top of that, it says an appellate court may require the mistake, defect or irregularity to be cured.

If the Appellate Division thinks that something fishy happened, they sure as heck will reverse. Clearly, this is an issue that he had in front of the State Court.

THE COURT: Yes, sir.

MR. DREIER: If I may, let me answer the question that you put to Mr. Smith. You asked him if I had seen the documents that you referred to. He addressed different documents.

You asked if we've ever seen the agreement to assign and assume in its full text. We have never seen the agreement to assign and assume in its full text. The amendments were redacted. There's been a recommendation that the redactions related to payments. Even if that's so, we should see that information.

The answer to your question is to this day we have never seen the amendments in unredacted form to the

[15]

agreement to assign and assume.

THE COURT: Is there anything further? The papers are well done. I understand the issues and I'm prepared to rule on them.

MR. DREIER: Your Honor, if I may be heard briefly, because I know you addressed certain questions to the validity of the judgment.

Frankly, we believe that that is not the main issue. These claims that we assert in this proceeding do not require this Court to overturn, ignore or distinguish this judgment. These claims are different claims from those that were addressed or resolved by the State Supreme Court.

Our complaint raises very serious claims about irregularities and improprieties in the County Clerk's Office in the

Village, and in the manner in which the defendants Feldstein and Morton participated in, if not in fact fostered.

We think our complaint states independent actions for civil rights and due process violations of Ulysses by reason of these irregularities and improprieties. I know the message is in our brief. I want to make sure that the bottom line is understood, which is that regardless of what Justice D'Emilio found on February 8th, 2000, his decision was that the contract between Rounick and

[16]

Feldstein should be enforced. He will direct that specific performance thereafter take place.

There was still a year and a half that preceded that in which Ulysses was the title holder of the property, and a title holder for those 18 months has certain rights.

If the deed is not the indication at any given time as to who holds the right to the property until a judge decides differently, there would be chaos with respect to whose rights should be honored or entertained in a county clerk's office or by the Village police.

At every step of the way here Ulysses was the title holder to this property, but at every step of the way the County, the Village, and these defendants ignored and violated Ulysses' property rights.

I don't understand why the fact that Justice D'Emilio, in February of 2000, decided that something should now take place, which is that specific performance should now be granted on a contract that was entered into years earlier, has any bearing on what Ulysses' rights as the title holder were for the 18 months that preceded that.

Ulysses went to the County Clerk's Office and tried to record its deed in the normal process and the County Clerk rejected it for no reason at all, which

[17]

prejudiced Ulysses.

THE COURT: How did it prejudice Ulysses?

MR. DREIER: Well, because by not having the deed recorded in the normal course, Dr. Feldstein evidently was able to get his lis pendens recorded before Ulysses got its deed.

THE COURT: How did that impact — how does that rise to the level of some type of constitutional claim? What's the difference with a lis pendens?

MR. DREIER. The lis pendens compromises our property rights.

THE COURT: What does that mean? I don't know what that means.

MR. DREIER: We were the title holder. We tried to record our deed on a timely basis. For some reason which we can't understand, the County Clerk rejected the deed. The Clerk took the lis pendens filed by Dr. Feldstein. The date clearly was changed on his lis pendens evidently to allow that lis pendens to be recorded before our deed was recorded.

THE COURT: The effect was it placed a cloud against Ulysses' title?

MR. DREIER: Yes.

THE COURT: That rises to the level of some type of constitutional claim?

[18]

MR. DREIER: It's a property right, your Honor.

THE COURT: Even though Justice D'Emilio has decided, rightfully or wrongfully, that in fact title is vested in Feldstein, not in Ulysses?

MR. DREIER: He decided the property in February 2000 should be transferred to Dr. Feldstein. He made no decision, in his opinion or his judgment, as to what Ulysses' property

rights were for the 18 months that preceded that. He did not say Ulysses had no property rights at any time. He said this contract should now be enforced and the property —

THE COURT: To have a 1983 claim you have to show that some constitutional right is infringed, among other things. So let's assume that the lis pendens was improperly filed. That means that 1983 is somehow triggered without any showing that there was any loss to you. You say it put a cloud. It didn't affect what happened before Justice D'Emilio. It didn't preclude some sale from being consummated. It had no end result.

MR. DREIER: But part of what Justice D'Emilio for that year and a half, we had property rights.

THE COURT: And there was a cloud on the property rights.

MR. DREIER: Yes. Justice D'Emilio can't undo that. Not only that, we were the owner of record. The

[19]

Village, nevertheless, honored either Dr. Feldstein or Mr. Morton as the owner.

In fact, Mr. Morton filed an application with the Village in which he represented that Feldstein was the owner, and the Village was prepared to go forward with his application to demolish the property.

THE COURT: This is all in your papers. It isn't going to make it more accurate or true or any more persuasive by saying it. I read the papers carefully.

MR. DREIER: At least with respect to the claim against the Village, your Honor, the Village Police responded to a non-title holder for a year and a half and evicted the title holder from the property before there was any decision from Justice D'Emilio.

We think that's a violation of our rights, particularly when at least one member of the Village was paid by Dr. Feldstein to do that. We think that's an interference with the property

rights of a title holder, at least before a Court determines otherwise.

THE COURT: If you think that somehow a Village police officer was somehow bribed by somebody to do something that they shouldn't have done, that's something that should be in the District Attorney's hands. You might want to consider that avenue.

You have a right to be here and I'll rule on the

[20]

applications, but I'm not so sure what that means. I don't know if that means that the particular Village police officer may have moonlighted and done some work for Dr. Feldstein. It may mean that, which wouldn't seem to be particularly appropriate, or it may mean that Dr. Feldstein did something supposedly which involved bribery of a police officer. I don't know what you're telling me.

MR. DREIER: What I'm telling you is the police were at the beckon call of Dr. Feldstein. We were the title owner for 18 months. We think it's a deprivation of our property rights.

THE COURT: Thank you.

Let me go through the various items. There's a number of motions, so we have to go through this in some detail and it will take some time.

MR. DREIER: Your Honor, may I make one last request? There's been a motion for sanctions that were submitted yesterday on behalf of Dr. Feldstein.

Insofar as the Court is going to entertain any motion for sanctions, either I would like to be heard on that this morning in addition to the argument that you heard so far, or I would suggest that if you're inclined to entertain any motion for sanctions, that the two motions be heard together. We only got Dr. Feldstein's

[21]

motion yesterday.

MR. SMITH: Your Honor, in following the rules, we merely drafted a motion and suggested they withdraw their complaint. I haven't filed a motion yet and I don't think it's technically made until the time period is up for them to act.

THE COURT: I think Mr. Smith is right on this. I don't think it's appropriately framed at this point. Plus a sanctions motion I consider very serious, and I would like input from plaintiff's counsel on this. I would like written input. I will go through that. I'm not going to rule on the sanctions motions today.

Firstly, by way of some background, the various motions that are made, with the exception of plaintiff's application to amend the complaint, are premised — and for sanctions not yet ripe — are premised on Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

12(b)(1) has to do with the question of whether this Court has subject matter jurisdiction. A recent case by the Second Circuit sets forth the standard and the methodology the Court should employ when confronted with that type of motion. The case is *Makarova -v- United States*, 201 F.3d 110 at 113, Second Circuit 2000.

Basically, the Second Circuit in that instance

[22]

notes that Rule 12(b)(1) is directed to those situations where the Court is devoid of subject matter jurisdiction.

By way of procedure, it indicates that, of course, the Court may look to items outside the pleading to determine whether the Court has subject matter jurisdiction.

And then finally the Circuit underscores for us that with this type of challenge the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it in fact exists.

Now, 12(b)(6) is a rule that we see more frequently and that's a motion that's directed to the face of the pleading, and

the Court's function in reviewing such a motion is to assess the legal feasibility of the complaint.

The Court's role is to determine, in essence, if the allegations made were established, whether the cause of action asserted would in fact be established. It's not my role, of course, to make any type of fact finding for purposes of a 12(b)(6) motion.

Moreover, I am required to draw all inferences in favor of the non-moving party. Moreover, I must deem each and every allegation of the complaint for purposes of 12(b)(6) to be accurate and to be on target.

In that regard, however, the Court's not

[23]

required, for instance, under a conspiracy count to accept mere conclusions or bold assertions.

The first question and the first motion that we will address is the motion brought on by Morton and Gibbs. Morton and Gibbs derive their interest in the property through Feldstein.

Now, Morton and Gibbs were not a party to the action before Judge D'Emilio, but of course Feldstein was. In fact, Feldstein was the named plaintiff. The other parties in that action were Rounick and Ulysses.

The Morton defendants actually filed a cross-motion in response to an application by plaintiff for a preliminary injunction, which application was heard before this Court several months ago. The motion is premised on both 12(b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure.

Before I actually review the grounds that are urged by the Morton defendants, I think it is appropriate to review the amended complaint. That is particularly germane with respect to 12(b)(6), and it's also relevant with respect to 12(b)(1) insofar as issues such as collateral estoppel have been asserted by the moving defendants.

The amended complaint indicates that this is a Federal action to readdress confiscation of its property

[24]

and, of course, the property being discussed is the subject property at 57 West End Road in East Hampton, and the named plaintiff in this case is, of course, Ulysses.

I think that first paragraph of the complaint is germane. It reads: Plaintiff, Ulysses and Company, Inc., Ulysses, brings this Federal action to readdress a confiscation of its property acquired for approximately $5 million without due process and in violation of the constitutional rights of the United States citizens who are its principals.

It's also significant to note that this complaint, which has multiple causes of action, has as its cornerstone, by way of Federal jurisdiction, so-called 1983 action. The other causes of action are here under pendent jurisdiction attached to the 1983 claim.

On page 2 of the complaint there is an indication that all of the defendants — or an allegation — in fact are conspirators, that the individual defendants, aided and abetted by the state and local government defendants, conspired to take property from Ulysses without due process of law.

In paragraph 14 of the complaint there's reference to the judgment that was entered in this case, which judgment was signed by Justice D'Emilio and is dated February 8th, 2000.

[25]

Paragraph 15 synopsizes the relief requested and again makes reference to Title 42 United States Code Section 1983, and again that's the underpinning which brings this case into this Court.

What follows is a long recitation of the history involving the interrelationship between the various parties insofar as it pertains to the 57 West End property.

On page 12 there's a portion of the complaint which is entitled the county clerk's unlawful assistance to Feldstein's wrongdoing, and the paragraphs which follow, which extend from 35 through 41, basically mirror the arguments voiced by Mr. Dreier during oral argument a moment ago.

It talks about an original deed which Ulysses obtained from Rounick, whereby Ulysses purportedly obtained title to the premises.

The document was dated August 25th, 1998. That document was submitted to the County Clerk for recording. The County Clerk or someone in his office indicated that it was illegible, and accordingly it was rejected.

It was returned on September 9th. The problem with readability of the document was corrected and the corrected deed or a clearer deed was submitted and recorded on September 21st, 1998.

[26]

In the meantime, plaintiff Feldstein, plaintiff in the Supreme Court action, commenced an action for specific performance against Rounick for this property.

At the same time he served a notice of pendency indicating that he had a claim for specific performance against this parcel, and the allegation is in the complaint that that notice of pendency was falsified.

There's an indication that the dates were incorrect and some things were whited out and so forth, the bottom line being that the recorded date was plainly falsified.

In paragraph 40 there's an indication that as a result of the foregoing manipulation of the recording and filing dates, Feldstein, with the assistance of the County Clerk, created the false impression that its notice of pendency preceded the transfer of title to the premises to Ulysses.

Moreover, lis pendens is said to have placed a false cloud on Ulysses' title.

Paragraph 48 talks about the parties conspiring to exclude Ulysses from the property, the primary conspirators — perhaps the only conspirators — being Feldstein, Morton, and Morton's sister Gibbs.

On page 21, there's a caption which reads. "The denial of due process by the State Court."

[27]

There's an indication that Justice D'Emilio, in his decision of January 31st, 2000, which is presently under appeal, by the way, with the Second Department of the Appellate Division, violated both the law and the facts of the case, and it was so egregious that apparently it constituted, in plaintiff's view, a denial of due process. That language is contained at paragraph 64.

There's reference to the assignment that was mentioned by Mr. Dreier, and the thought is that the State decision is clearly erroneous because it failed to recognize that a certain assignment, which I'm told and I will accept for present purposes to be accurate, former State Judge, Judge Araujo, did not provide to plaintiff. Moreover, that document was not provided to Justice D'Emilio and, accordingly, his decision was allegedly flawed.

Again, that point is a point on appeal which is before the Second Department.

Paragraph 67 indicates the State Court compounded its denial of due process by awarding Feldstein specific performance as its remedies.

The introductory paragraphs are 1 through 72. The introductory paragraphs are incorporated by reference in each of the causes of action asserted against each of the defendants. When we discuss each of the defendant's

[28]

motions we will return to the corresponding count or counts.

One other item I would like to mention is in the wherefore clause, which has multiple paragraphs. The one designated as a capital B reads as follows:

On count two declaring that all determinations with respect to the ownership, access and control over the premises shall henceforth be made by this Court and the Federal Government and not by the state and local government defendants.

Just as an aside, the State is no longer a party to the action, having been dismissed on consent. Justice D'Emilio is not a defendant in the action.

Suffolk County does not have the authority to make decisions that affect real property as far as the question of where ownership rests, nor does the Village of Southampton.

But, in any event, against that backdrop, to return to the motions made by the defendants Morton, the motion that's under discussion is the motion to dismiss each of the causes of action that is asserted against defendants Morton and Gibbs.

The basis for the motion is essentially multi-pronged, and includes the following.

Firstly, the action must be dismissed under the

[29]

Rooker-Feldman doctrine. Additionally there's a claim that the doctrines of res judicata and collateral estoppel preclude the present action from proceeding in this forum; and, moreover, *Younger -against- Harris* dictates that this matter should be dismissed vis-a-vis these two moving defendants. These arguments are in the disjunctive.

The Rooker-Feldman doctrine is the first one that's raised, and that's under 12(b)(1). That's a claim that this Court lacks jurisdiction.

In that regard, the Court is required to focus upon the pleading and, of course, I'm permitted to go outside the pleading for purposes of 12(b)(1) and to determine what I'm being asked to do.

Am I being asked to review the legitimacy of the State Court determination? I'm also required, as part of that process, to determine whether the constitutional claims that are advanced here through the 1983 claim are inextricably interwoven with the States Court's decision.

Now, if the answer to either of those questions is yes, then movant is correct, I do not have subject matter jurisdiction.

Movants have cited a number of cases which are very instructive on this point. Firstly, of course, the Rooker case which was decided in 1923 by the Supreme Court and which bears the full title of *Rooker -against-*

[30]

Fidelity Trust Company, 263 U.S. 413, is obviously germane and bas been reviewed.

Now, the other part of the Rooker-Feldman doctrine requires reference to a case decided 60 years after Rooker by the Supreme Court which bears the caption or the title *District of Columbia Court of Appeals-v- Feldman*, 460 U.S. 462, 1983.

There's a case entitled *Vasile -v- Dean Witter Reynolds*. I think that was a case by Judge Seybert here in the Eastern District of New York, decided in 1998. That case was subsequently affirmed. I don't have the cite for the affirmance, but it was affirmed, I believe, in a summary order.

As noted by Judge Seybert in that case: "A plaintiff may not institute an action in Federal Court that indirectly changes the holding or decision of a State Court by raising issues in Federal Court that are inextricably interwoven with the State Court's decision."

The concept of inextricably interwoven or intertwined is obviously significant for present purposes.

Justice Marshall, concurring in the case of *Pennzoil -against-Texaco, Inc.*, 481 U.S. 1 at page 25 in 1987, provided some guidance in that regard.

He explained: A Federal claim is inextricably -

[31]

intertwined with a State Court judgment if the Federal claim succeeds only to the extent that the State Court wrongly decided the issue before it where Federal relief can only be predicated upon a conviction that the State Court was wrong, it is difficult to conceive the Federal proceeding as, in substance, anything other than a prohibited appeal of the State Court judgment.

Juxtapositioning Justice Marshall's explanation and the other cases cited, including another case I'll mention that was provided by movant's counsel, it's *Bal -v- New York City Loft Board*, a decision reported in the July 13, 2000, New York Law Journal at 37.

That's a decision by Judge Koeltl of the Southern District of New York. He goes through the Rooker-Feldman doctrine and explains it.

Another case which bears mention is a case by the Second Circuit. I think it was written by Judge Walker, speaking for the panel. It's *Moccio -v- New York State Office of Court Administration*, 95 F.3d 195, Second Circuit 1996.

Now, here the gravamen of plaintiff's complaint, prescinding for the moment from the question of the pendent jurisdictional claims, is quite clearly that Justice D'Emilio was wrong.

Thus, we hear that Armand Araujo, who was

[32]

appointed to supervise discovery, made an error purportedly with respect to turning over certain documents which documents, in plaintiff's view, would indicate that plaintiff Feldstein, plaintiff in the State action, breached the contract via an assignment to the Morton defendants.

We're also told that because of the purported error by Judge Araujo, that the decision of Justice D'Emilio is wrong.

Now, to prevail on that claim or any of these claims, basically this Court would be required to say that Justice D'Emilio dropped the ball.

There is a mechanism for a federal final review of a State Court decision, but that authority and that responsibility rests with the Supreme Court of the United States, not with this Court.

The key part of this analysis, I think even for the purposes of 12(b)(1), is to look at the complaint as drafted and then to look at the decision of Justice D'Emilio which was decided in January of this year. Clearly, I am being asked to review the work product of Justice D'Emilio.

Now, there is an available mechanism obviously to review the work product of Justice D'Emilio, and that's via an appeal to the Second Department. There is such an

[33]

appeal pending.

I have been furnished by the movants with information concerning the appeal to the Second Department. In the important particulars, that appeal basically raises the same issues that are before me.

But the point is this belongs in the State Court, not here. More appropriately said, under the Rooker-Feldman doctrine I don't have subject matter jurisdiction.

Now, there has been mention about this judgment, so I'll mention that as well. Apparently what happened is that Justice D'Emilio, in his January 31st, 2000, decision, indicated that the decision would constitute both the judgment and decision of the Court when the successful party in that litigation — that would be the plaintiff in the Supreme Court — endeavored to have that decision and judgment entered. The County Clerk said they needed a separate judgment and, accordingly, at that point a judgment was prepared.

Now, I have looked at the judgment and I have looked at the decision. The decision directed that — this is the decision

of Justice D'Emilio — he indicated that, number one, Dr. Feldstein did not breach the contract; number two, that Mr. Rounick had breached the contract of sale which would have resulted in title being

[34]

transferred from Rounick to Feldstein. He also directed that the plaintiff in that action, Dr. Feldstein, was entitled to specific performance.

The point is, Justice D Emilio, rightfully or wrongfully, constitutionally or unconstitutionally, decided that case, and it is clear in the Supreme Court's decisions it isn't a question of whether the State Court was correct or incorrect. That's not the issue.

So now the question about when the judgment was actually filed. Apparently what happened is — and I'm construing all this most favorably to plaintiff — apparently what happened is counsel for the Morton defendants prepared a proposed judgment. It was submitted directly to Justice D'Emilio and he signed it. So that is the judgment in the case, what Justice D'Emilio signed.

Now, if there's any irregularity in the judgment, if the judgment departs from Justice D'Emilio's decision, and I don't think it does in the important particulars for present purposes; i.e., who is the owner of the property. In that regard, they're identical. The owner of the property, according to Justice D'Emilio, is Dr. Feldstein, period. But to the extent there is some difference between the judgment as filed and the judgment or the decision of Justice D'Emilio, that's a matter that can be addressed. There's a mechanism for that to be addressed.

[35]

Now, Mr. Dreier indicates Justice D'Emilio does not entertain — on occasion, at least in his situation apparently, in this case invariably – oral argument. It's difficult to reach him on the phone, but he does entertain applications, which, of course,

he must. If anybody wants to make an application by way of motion, they make it and he will decide it.

To the extent there's an irregularity in the judgment, that should have been addressed in the State, presumably to Justice D'Emilio. It may even be -- and I don't know — that the Appellate Division might have some control over that. Mr. Smith has voiced the view, and I think he's absolutely right, if there is some fundamental irregularities which taint or compromise the legitimacy of the State proceeding, the Appellate Division will reverse the judgment.

Now, also, as we all know, there is a final judgment here. There's a final judgment for purposes of the Rooker-Feldman doctrine even though Justice D'Emilio's decision is presently under appeal. There are a host of cases that stand for that point, and it's not subject to debate.

Now, independently of the Rooker-Feldman doctrine, there's also the question of res judicata and collateral estoppel. Res judicata is at least

[36]

traditionally viewed as claim preclusion, and usually when we think of collateral estoppel we think of issue preclusion.

Now, in this case it's true that the Morton defendants were not parties to the State action. It is also true, however, that they clearly are in privy to Dr. Feldstein. As a matter of fact, they derived their title through him, or their interest in the property through him.

Collateral estoppel — forgetting about res judicata — there's no question there's collateral estoppel effect to this judgment reached by Justice D'Emilio. That's another ground upon which — withdrawn.

The first issue — the first question involves 12(b)(1). Under 12(b)(1), this Court is without subject matter jurisdiction.

Now we're going to a separate ground. Under 12(b)(6), does the complaint state a cause of action upon which relief can be granted against either or both of these defendants.

Now, in that regard the answer again would be no, and the reason for that would be the collateral estoppel. In *Younger -against- Harris* — that's a third ground and it need not be addressed and will not be addressed in view

[37]

of what's been said previously.

The application by the Morton defendants to dismiss the 1983 claim is granted. It's granted on the basis that the Federal claim which is asserted against them is inextricably intertwined with the State Court judgment rendered by Justice D'Emilio and which is presently under appeal to the Second Department.

Now, with respect to the other claims against this defendant, they again are State claims which are attached to the Federal claim. The Morton defendants through their attorneys have attacked each of those claims, and I think actually quite well. I'm not going to wade through each of them. What I will do is dismiss them on grounds there's no reason for me to retain these purely State claims in view of the fact that the 1983 action is inappropriately before me and cannot be considered.

Now, there's other issues — we can spend all day on this — the question of conspiracy. Supposedly, these defendants are members of a conspiracy. That would be under 12(b)(6). Conspiracy has to be alleged with a certain level of specificity. I think that the allegations here fall short of the mark. I'm not even going to go down that road because it's unnecessary.

On the 12(b)(6), on the face of the pleading it's clear there's collateral estoppel. The face of the

[38]

pleading refers at great length, and I think it's incorporated as an exhibit to Justice D'Emilio's decision.

Therefore, the Court has looked at the decision. The end result of the process is that collateral estoppel indicates that

there is no viable cause of action that's been stated as against these defendants and, accordingly, and alternatively, it is dismissed under 12(b)(6).

Now, the motion by the defendant Feldstein in very well crafted papers have set forth a multiple attack on the complaint insofar as it pertains to Dr. Feldstein, and many of these claims are stated in the alternative.

As indicated, the Morton and Gibbs defendants derived their interest in the property through Feldstein. The same thing that was said previously concerning the Rooker-Feldman doctrine's applicability to this case is equally applicable to Dr. Feldstein.

So, accordingly, the claims against Dr. Feldstein are also dismissed on the grounds this Court lacks subject matter jurisdiction. That being the case, I'm not going to go through the other arguments that are raised. I will note, however, and I do rule, that with respect to the State claims which are attached to the Federal claim, that they are dismissed in the exercise of my discretion. There's no valid reason for the Court to retain

[39]

jurisdiction over those claims in this action, which is in its infancy, when the Federal predicate is fatally flawed.

Next, I'll address the motion made by the Village of East Hampton. With respect to the Village of East Hampton, Mr. Dreier has mentioned that some of the conduct which is alleged against the Village of East Hampton predates Justice D'Emilio's decision, and such conduct occurred at the time when title was in Mr. Rounick.

Now, the motion of the — I will step back for a moment. With respect to Dr. Feldstein, we addressed the 12(b)(1) motion, and that's the one that has to do with the Rooker-Feldman doctrine. We've also discussed the pendent claims. We haven't discussed collateral estoppel.

I will incorporate by reference what I said with respect to the Morton defendants vis-a-vis Dr. Feldstein. The doctrine of collateral estoppel is clearly applicable here. There was an

issue that was decided by Judge D'Emilio. It is the central issue in this case. That determination is entitled to the collateral estoppel effect or issue preclusion effect.

In that regard I find — and this is true not only of Dr. Feldstein's application but also the Morton defendants — that notwithstanding Ulysses' protestations

[40]

to the contrary, there's no doubt that Ulysses was provided with a full opportunity to present these issues before the State judge, and to the extent they feel the State court erred, to raise it in the Appellate Division.

He complains about the decision during discovery. That's an error that is readily correctable within the State system. It's not something that would permit a party to come to a Federal Court to basically overrule the determination of a discovery referee.

To return to the situation concerning the Village of East Hampton, basically what happened is that individuals affiliated with the present plaintiff endeavored to gain access to the property, that being 57 West End Road, and the allegation is — and, of course, the allegation is accepted as true — that they were precluded from gaining entry to the property, compliments of the intervention of a Village police officer.

As a result of that — and again, some of the conduct predates Justice D'Emilio's decision — as a result of that conduct, the Incorporated Village of East Hampton has been sued.

We do know, as pointed out in the Village's memorandum of law, that the Village is not responsible for the acts of a police officer under these circumstances under the doctrine of respondeat superior.

[41]

Rather, for the Village to be held responsible, there must be some linkage between the conduct and a practice or custom of the Village or a policy of the Village which permitted this

to happen. Absent from the cause of action asserted against the Village is any reference to a policy, practice or custom.

So for that reason there clearly — the pleading is clearly insufficient under 12(b)(6) to withstand scrutiny vis-a-vis the Village.

Now, also, there is an allegation here concerning a conspiracy. Supposedly, the Village is one of the conspirators who endeavored or had as a goal depriving Ulysses of due process concerning the subject property.

Again, there are specific requirements that must be met when a conspiracy is alleged. Those standards have not been met, so on that ground, which is a disjunctive ground, the pleading fails to pass muster under 12(b)(6).

Now, another issue concerns whether this Court has subject matter jurisdiction. To the extent that the conduct is said to predate the determination by Justice D'Emilio, arguably the Court may have subject matter jurisdiction but that's an argument that doesn't have to be addressed or resolved.

It certainly would be true for any conduct that postdates that decision that the Court lacks subject

[42]

matter jurisdiction, because for me to find that the police officer acted improperly would require a determination that Ulysses has a property right in the subject premises, which is completely contrary to what Justice D'Emilio decided.

In any event, and to kind of synopsize this clearly, the 1983 claim against the Village does not pass muster because it does not allege that the activities of this Village police officer was in any way attributable to a policy, practice or custom of the Village. On that ground it clearly falls.

The conspiracy is also improperly alleged, which is part of the same cause of action. I'm not going to address the other two grounds.

The last of the motions to dismiss involve the County of Suffolk and the individually named defendant Edward Romaine, who is the County Clerk of the County of Suffolk.

Firstly, as far as the County of Suffolk is concerned, when plaintiff discontinued against the State or did not oppose the State's motion to dismiss, it would seem they probably should have taken the same position vis-a-vis the County of Suffolk.

For the same reasons articulated with respect to the Village of East Hampton, not being responsible for the

[43]

purported acts of its police officers, the County of Suffolk is not responsible under respondeat superior for the acts of defendant Romaine.

Moreover, as to this cause of action — and again, I'm doing this under 12(b)(6) — there is no allegation that, in fact, the County Clerk acted pursuant to a policy or custom of the County of Suffolk. The action against the County of Suffolk is dismissed.

Also, under 12(b)(6), there's a pleading deficiency, and this is alternatively regarding the purported conduct of the defendant Romaine.

For 1983 to come into play, obviously one of the elements of the cause of action is that there's some constitutional right that was compromised.

In this instance, the constitutional right asserted is the taking of property without due process of law.

However, juxtapositioning of what the County Clerk supposedly did against what's required to adequately allege a 1983 action indicates that his conduct — assuming, arguendo, it's true, as I must for purposes of 12(b)(6) — did not lead to the plaintiff Ulysses having a constitutional right compromise.

There's an indication that it clouded the title. There's no indication that that somehow caused some loss

[44]

of property to Ulysses.

Similarly, the situation about the recording of deeds and so forth, this isn't a situation where one individual reached the courthouse before another and filed a deed, where the first individual might have some type of priority as to ownership of the property. The ownership of the property here was determined compliments of Justice D'Emilio.

So what I'm saying is even if, arguendo, I accept that the County Clerk was involved in some type of impropriety in the recording of these various documents, there's no identifiable constitutional right that's been identified as being compromised.

Also, with respect to the conspiracy assertion against this defendant, the pleading does not pass muster. It doesn't have the requisite specificity concerning that allegation. There are other grounds that have been advanced on behalf of both the County and the defendant Romaine in seeking the dismissal of this pleading.

However, for the reasons indicated, the causes of action against the two named defendants are dismissed and, accordingly, the other grounds advanced for dismissal will not be addressed.

There's also a point which will be mentioned, and

[45]

it's purely in the disjunctive, but it would appear that to the extent any effort is made to link the alleged irregularities perpetrated by the County Clerk to the determination that Dr. Feldstein is entitled to specific performance of his contract to purchase this property, the Rooker-Feldman doctrine does come into play.

For me to find that the conduct, to the extent that nexus can arguably be established, somehow defeated the claim of Mr. Rounick, I would be calling into play the determination of Justice D'Emilio.

Justice D'Emilio has said that this property rightfully belongs to Dr. Feldstein. In any event, that last argument is really a disjunctive argument, and it need not be further pursued.

So the claims against that defendant or those defendants, the County of Suffolk and Edward Romaine as the County Clerk of Suffolk County, are similarly granted.

There's another application here and this is an application to amend the complaint. The complaint has been amended once.

The Court well recognizes that applications to amend should be freely granted. There's a very liberal standard in that regard. However, in some instances an application to amend a complaint would be denied where it

[46]

appears that any amendment would essentially be a futile act.

As an aside, I do note that in this case there's been a great deal of legal work spent by plaintiff as well as each of the defendants in this Court, notwithstanding the fact that this Court lacks subject matter jurisdiction.

The point is that the legal fees are escalating, the costs to the parties are escalating, the time devoted to what appears to be a futile quest is escalating.

Notwithstanding that, the fact of the matter is that these type of applications should be granted liberally and typically will be granted, and I almost invariably grant them.

To return to the subject of a futile amendment, that issue is discussed in a recent case of the Second Circuit which bears the title *Cuoco against Mooritsugu*, 2000 Westlaw 1041227, July 28th, 2000, Second Circuit.

Here, plaintiff's counsel has indicated in his letter of June 9th, 2000, more particularly on the fifth page, I am asked to provide leave to amend its complaint "to show the invalidity

of the February 8th judgment and thereby further demonstrate the jurisdiction of the Court to entertain Ulysses' claim."

This question of the impropriety of the June 8th

[47]

judgment has already been discussed. The judgment is presumptively valid, it's signed by a Justice of the Supreme Court and happens to be on appeal to the Second Department. The mere fact that there may be some irregularity in the judgment, the mere fact there may be some error in the underlying decision which prompted the judgment, does not derail the Rooker-Feldman doctrine.

So, based on the proffer that's been made as to what would be the purpose of the amendment, the application or the motion to amend the complaint is denied.

There's also another application which is not fully framed. Nonetheless, in the exercise of my discretion, I will rule on it now.

It's an application brought on behalf of the defendant Feldstein, and basically what it asks is that this Court issue an injunction which would preclude Ulysses from bringing any further actions in the Eastern District of New York and, probably even broader than that, in any federal district court concerning the ownership of the subject property.

I have reviewed the cases cited and I'm going to decline to grant that application. Typically, although not invariably, such orders are entered when there have been multiple frivolous suits that have been filed by a

[48]

litigant.

In one of the cases which was before the Second Circuit, the name of which escapes me, the litigant had brought 250 actions and appeals in various courts. In Judge Seybert's case, the case mentioned earlier, I think there were three or four that were brought.

In my judgment the issuance of such an extreme order, and the order is basically — I misstated it earlier. Basically the application is you can't bring any suit in either the Eastern District of New York nor arguably in any other Federal District without prior approval of me.

I have a certain amount of discretion in that regard, and I'm going to decline to grant that application even on the presentation which has been made, which is obviously one sided because the plaintiff never responded to it, to my knowledge. It doesn't suffice, so I'm not going to grant that.

The only other item we have left is the question of sanctions, and Mr. Smith indicated the posture of that. So it is not framed. I think that's an important matter.

Am I looking at the wrong man? Mr. Pierce, this is your application?

MR. PIERCE: We have one that is framed and the

[49]

time constraints have been honored and the motion filed. He's had notice for over a month, but there's been no response. There's a second one that isn't perfected.

THE COURT: There's two motions for sanctions. I think a sanction motion is of great importance. I think it's very important that any time such an application is made that the target of the application have an opportunity to fully respond, both legally and factually, and so I'm going to defer on both of them.

The one that was made by Mr. Pierce, Mr. Dreier, I don't think you answered that, have you?

MR. DREIER: Your Honor, we intended in part for the memo in opposition to address the merits. I would like the opportunity to respond now that you ruled on the motion.

THE COURT: How much time do you want on it?

MR. DREIER: There's also the motion that was made by Mr. Smith, and I would like to respond together. I got that motion yesterday. Can I have three weeks, your Honor?

THE COURT: That's fine. Movant gets the last word. Today is August 1st. We will expect Mr. Dreier's papers in opposition by August 22nd. I expect papers from the movants, to the extent they deem a reply is required, by August 31st.

[50]

MR. PIERCE: If your Honor please, may I stretch that a bit? I think we're working into the Labor Day weekend there, so another few days would be very helpful.

THE COURT: I have no problem with that.

I will give Mr. Dreier a little more time and we will work from there. You asked for three weeks. We will put it over to the 29th for your papers and then the reply papers by the defendants will be September 15th.

I'm going to need orders on this. I would like each of the defendants — the defendants have prevailed on each of their applications, so what I would ask the respective defense counsel to do is to prepare proposed orders, settle them on notice so Mr. Dreier sees them, and you can make them fairly straightforward.

We have a full record of what transpired today. You can just indicate the nature of the motion and granted. There shouldn't be any problem with the orders because they are relatively straightforward. If there is any problem, not to what brought them about, but the verbiage, make sure it's consistent with the bench decision, then counsel can arrange for a conference call rather than drag everybody back in here.

I don't think there's anything further that we have to do today. I do note that all of these rulings, to the extent they're adverse to the plaintiff, is over the

[51]

plaintiff's strenuous objection, so your position is well noted.

Anything further we have to do? If not, we will stand in recess. Thank you very much, counsel.

(Proceedings concluded.)

Appendix H

SHORT FORM ORDER

INDEX NO.: 0020970/1998
SUBMIT DATE: 4/18/2001
MTN. SEQ.#: 013; 014

SUPREME COURT — STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 4/13/2001
MOTION NO.: 013-MOT D
014-XMD

X

GARY FELDSTEIN,

Plaintiff,

– against –

JACK ROUNICK and
ULYSSES I & COMPANY, INC.,

Defendants.

X

Upon the following papers numbered 1 to 75 read on this motion for an order vacating the judgment dated 2/7/00 (D'Emilio, J) and other relief, and cross-motion for an order directing the Sheriff of Suffolk County to execute a deed; Notice of Motion/Order to Show Cause and supporting papers 1-29; Notice of Cross-Motion and supporting papers 30-48; Answering Affidavits and supporting papers 49-55; 56-58; 59-66; Replying Affidavits and supporting papers 67-75; Other _____; and counsel for plaintiff, defendant Ulysses and non-party Suffolk County Sheriff having appeared before this Court on April 18, 2001 and having presented oral argument in favor and opposed to the respective applications, it is

ORDERED that this motion by defendant, Ulysses I & Company, Inc. (Ulysses), to the extent it seeks an order pursuant to CPLR 2221 granting leave to renew the prior cross-motion by plaintiff, Gary Feldstein, for an order granting summary judgment in his favor is denied; and it is further

ORDERED that to the extent the motion by defendant Ulysses seeks an order pursuant to CPLR 5015(a)(2) and (3) vacating the prior judgment of the Court (D'Emilio, J.) dated February 7, 2000, such application is granted for reasons herein set forth and said judgment is hereby recalled and vacated; and it is further

ORDERED that the plaintiff shall submit on notice a proposed judgment with supporting papers no later than June 4, 2001, and each of the defendants, should they deem it appropriate, shall submit on notice a proposed judgment with supporting papers no later than June 20, 2001; and it is further

ORDERED that the cross-motion by plaintiff for an order directing the Sheriff of Suffolk County to execute a deed to the subject premises is denied; and it is

ORDERED that in all other respects the applications are denied.

By Order of the Hon. Gerard D'Emilio dated January 31, 1999, a motion by defendant, Ulysses I & Company, Inc. (Ulysses) for summary judgment and a cross-motion by co-defendant, Jack Rounick, for dismissal of the complaint were denied and the cross-motion by plaintiff, Gary Feldstein, for summary judgment in his favor was granted. The determination of the Court was made upon the following facts: On or about May 24, 1993, Feldstein entered into a written contract to purchase certain real property from Rounick for a sales price of $7,000,000. The sales contract between Rounick and Feldstein contained a schedule of payments to have been made by Feldstein and included a provision that, "Feldstein will continue to pay for the insurance on the house as well as all related expenses such as, fuel, electric, trash removal, phone, gardening, pool maintenance, cable, water, etc." Such contract was amended by written agreement dated July 4, 1993

and again by written agreement dated May 30, 1997. The second amendment to the contract established a schedule under which the sale price of $7,000,000 was to be paid in installments. The parties acknowledged in the agreement receipt of $1,800,000 and required payments of $25,000 per month commencing June 1, 1997 through and including September 1, 1998, with an additional $1,300,000 to be paid "on or about October 1, 1998 (the 'Scheduled Closing Date')." The second amendment also gave Feldstein an option prior to the "Scheduled Closing Date" of October 1, 1998 to pay Rounick $1,200,000 and require an existing mortgage on the property to be satisfied in return for transfer of title, and reduced the last payment due on October 1, 1998 to the amount of $100,000. Under the terms of the second amendment, real estate taxes levied against the property were to be paid by Feldstein beginning October 1, 1997.

On or about August 10, 1998, Feldstein entered into a written agreement with Peter Morton under which it was agreed that Feldstein would assign to Morton his contractual right to purchase the East Hampton premises for a purchase price of $9,700,000. Thereafter, by letter dated August 20, 1998, Feldstein asked Rounick either to accept a mutually agreeable amount representing the present discounted value of future payments to have been made under the agreement or to accelerate the closing of title to August 28, 1998 under the terms of the second amendment to the agreement. Feldstein was advised by letter, however, that Rounick had sold the property to Ulysses on August 24, 1998. By the filing of a summons and complaint on August 31, 1998, Feldstein commenced this action against Rounick and Ulysses seeking specific performance of the contract. While Feldstein also advised Rounick and Ulysses by letter dated September 3, 1998 that he wished to accelerate the closing of title under the terms of his contract, subsequent efforts to do so proved fruitless.

By short form order dated January 31, 2000, it was determined by the Court on plaintiff's cross-motion for summary judgment that Feldstein had demonstrated his readiness, willingness and ability to complete the purchase of the property

through his submission of the affidavit of a managing partner of Decten Fund, L.P., in which it was indicated that Feldstein maintained an account balance in the amount of $2,632,185. The Court further held that Rounick breached his contract with Feldstein by selling the property to Ulysses and by encumbering the property with a $3,000,000 purchase money mortgage.

A judgment dated February 7, 2000 and filed in the office of the Clerk of the County of Suffolk on February 8, 2000 directed Rounick and Ulysses to "specifically perform the contract entered into with the plaintiff on May 24, 1993, as amended by amendments dated July 4, 1993 and May 30, 1997" and "execute all documents necessary to transfer to plaintiff good and marketable title to the property located at 57 West End Road, East Hampton, New York . . ." Under the terms of such judgment, Feldstein was to tender the balance of the purchase price simultaneously with the delivery of the deed and, upon defendants' failure or refusal to execute the deed and transfer title, the Sheriff was directed to execute a deed for the premises. An appeal of the order and judgment was thereafter taken, and by Decision and Order dated October 10, 2000, the Appellate Division, Second Department, affirmed the judgment, noting the following: "The record demonstrates, as a matter of law, that the plaintiff buyer was ready, willing, and able to perform his obligations under the contract, even though his tender of performance was excused by the defendant seller's anticipatory breach . . ."

Defendant Ulysses now moves for an order vacating the judgment dated February 7, 2000 (D'Emilio, J.) pursuant to CPLR 5015(a)(3) on the ground that it was submitted *ex parte* and, therefore, that it was obtained as the result of misconduct of an adverse party. It is not disputed in the record before this Court that such judgment granting equitable relief was obtained *ex parte* and, as such, it was not entered in accordance with CPLR 5016(c), since the defendants were not given an opportunity to be heard on its contents. Furthermore, in view of the representation in defense counsel's affirmation that, "since August 1988, Ulysses has been paying the real estate taxes and, until recently, all utility bills . . ." and the continued

occupancy of the premises by the plaintiff's assignee, equity demands that appropriate adjustments be made at this time (*see, e.g., Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 196 AD2d 564, 601 NYS2d 334 [2d Dept. 1993], appeal denied, 83 NY2d 756, 637 NE2d 277, 614 NYS2d 386 [1994]). Courts have long recognized that a court granting the equitable remedy of specific performance will, so far as possible, place the parties in the same situation as they would have been had the contract been performed according to its terms (*4200 Avenue K Realty Corp. v. 4200 Realty Co.*, 123 AD2d 419, 506 NYS2d 723 [2d Dept. 1986], appeal dism'd, 69 NY2d 944, 509 NE2d 351, 516 NYS2d 656 [1987] [citations omitted]).

Insofar as movant seeks an order granting leave to renew the prior application by plaintiff, this Court is mindful that a motion for leave to renew generally must be based upon additional material facts which existed at the time the prior motion was made but were not then known to the party seeking leave to renew and, therefore, not made known to the Court (*Morrison v. Rosenberg*, __AD2d__, 717 NYS2d 354 [2d Dept. 2000], citing *Shapiro v. New York*, 259 AD2d 753, 687 NYS2d 401; *see also LaRosa v. Trapani*, 271 AD2d 506, 706 NYS2d 911 [2d Dept. 2000]). A review of movant's papers reveals that they are completely devoid of any proof in evidentiary form sufficient to create an issue of fact so as to alter the result of the underlying summary judgment motion. Moreover, while movant claims that a trustee's allegations of fraudulent transfers of money by plaintiff which are asserted in a complaint filed in connection with a bankruptcy proceeding constitute new facts justifying renewal of the motion, such allegations, without more, would not have changed the outcome of the summary judgment application. Even if such allegations were accepted as true and the funds allegedly obtained through fraud were deducted from the $2,632,185 balance in plaintiff's Decten Fund at the time of the closing, such evidence is insufficient to raise an issue of fact against plaintiff's proof that he was a ready, willing and able buyer. Accordingly, to the extent movant seeks leave to renew the underlying sum-

mary judgment application, such application is denied in its entirety.

DATED: 14 MAY '01

/s/ John J.J. Jones, Jr.
HON. JOHN J.J. JONES, JR.
J.S.C.

TO:

STROOCK & STROOCK & LAVAN, LLP
By: Kevin L. Smith, Esq.
Attys. for Plaintiff
GARY FELDSTEIN
180 Maiden Lane
New York, NY 10038

TWOMEY, LATHAM, SHEA & KELLEY, LLP
By: Christopher D. Kelley, Esq.
Attys. for Plaintiff
GARY FELDSTEIN
33 West Second Street
Riverhead, NY 11901

MARC S. DREIER, ESQ.
Atty. for Defendant
ULYSSES & COMPANY, INC.
499 Park Avenue
New York, NY 10016

MINTZ & GOLD, LLP
By: Steven Mintz, Esq.
Attys. for Defendant
ULYSSES & COMPANY, INC.
444 Park Avenue South
New York, NY 10016

ROBINOWITZ, COHLAN & DUBOR, LLP
Attys. for Defendant
JACK ROUNICK
199 Main Street
White Plains, NY 10601

ROBERT J. CIMINO
Suffolk County Attorney
Atty. for Non party
SUFFOLK COUNTY SHERIFF
H. Lee Dennison Building
100 Veterans Memorial Highway
Hauppauge, NY 11788

Appendix I

AT IAS part 33 of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse, 235 Griffing Avenue, Riverhead NY on the 7th day of February, 2000.

PRESENT: HONORABLE GERARD D'EMILIO
Justice

FILED
FEB 08 2000
EDWARD P. ROMAINE
CLERK OF SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

GARY FELDSTEIN,

Plaintiff,

– against –

JACK ROUNICK and
ULYSSES I & COMPANY, INC.,

Defendants.

JUDGMENT

Index No. 98-20970

The plaintiff, Gary Feldstein, having cross-moved for an Order pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiff and against the defendants Jack Rounick and Ulysses I & Company, Inc., and the issues having come to be heard by IAS Part 33 of this Court, Suffolk County, at the Courthouse, 235 Griffing Avenue, Riverhead, New York, before Justice Gerard D'Emilio on April 5, 1999, and the court, after due deliberation thereon, having made and signed a written decision dated January 31, 2000, granting judgment in favor of the plaintiff, Gary Feldstein, and awarding specific performance as against the defendants demanded in the complaint, and the aforesaid described decision of the Court having been duly filed herein, it is now

ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants, Jack Rounick and Ulysses I & Company, Inc., to the extent hereinafter set forth, on the merits; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Jack Rounick and defendant Ulysses I & Company, Inc. shall specifically perform the contract entered into with the plaintiff on May 24, 1993, as amended by amendments dated July 4, 1993 and May 30, 1997 (collectively, the "Contract"), and execute all documents necessary to transfer to plaintiff good and marketable title to the property located at 57 West End Road, East Hampton, New York (District 0301; Section 015.00; Block 05.00; Lot 008.000), free and clear of all encumbrances on ~~February 18~~ March 10, 2000 at the offices of Stroock & Stroock & Lavan, LLP, the attorneys for the plaintiff, at 10:00 a.m. in the forenoon; and it is further

ORDERED, ADJUDGED AND DECREED that simultaneously with the delivery of the deed herein, the plaintiff shall tender the balance of the purchase price in accordance with the Contract, and it is further

ORDERED, ADJUDGED AND DECREED that if the defendants shall fail or refuse to execute the deed and transfer good and marketable title, free and clear of all encumbrances by 5:00 p.m. ~~February 18~~ March 10, 2000, in addition to plaintiff's right to proceed by way of contempt proceedings to enforce this judgment and its provisions and any other lawful means available, the Sheriff is directed to execute a deed for the premises described in the Contract; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff shall have execution against the defendant Jack Rounick who resides at The Jockey Club, 11111 Biscayne Boulevard, Building No. 2, Miami, Florida 33181 and Ulysses I & Company, Inc., c/o Potter Anderson & Corroon, 1313 N. Market Street, Wilmington Delaware 19899.

ENTER.

/s/ Gerard D'Emilio
J.S.C.

HON. GERARD D'EMILIO

GRANTED
FEB 7 2000
Edward P. Romaine
Clerk of Suffolk County

FILED
FEB 08 2000
Edward P. Romaine
Clerk of Suffolk County

Appendix J

SUPREME COURT — STATE OF NEW YORK
I.A.S. PART 33, SUFFOLK COUNTY

Present:
Hon. GERARD D'EMILIO — Index No. 20970/1998

MOTION DATE — APRIL 5, 1999
MOTION SEQ. NO. — 005; 006; 007; 008; 009
MD; MD; MD; MG; MG

GARY FELDSTEIN,
Plaintiff,
– against –
JACK ROUNICK and
ULYSSES I & COMPANY,
Defendants.

PLTF'S/PET'S ATTY:

STROOCK & STROOCK & LAVAN, LLP
180 Maiden Lane
New York, New York 10038

DEFT'S/RESP'S ATTY:

ROBINOWITZ, COHLAN & DUBOR, LLP
Attys. for Deft. ROUNICK
199 Main Street
White Plains, New York 10601

PROSKAUER ROSE LLP
Attys. for Deft. ULYSSES I
1585 Broadway
New York, New York 10036-8299

ESSEKS, HEFTER & ANGEL, ESQS.
Co-Counsel for Deft. ULYSSES
108 E. Main Street — P.O. Box 279
Riverhead, New York 11901

Upon the following papers numbered 1 to 47 read on these motions by defendants and Plaintiff, for various reliefs

Notice of Motion/Order to Show Cause and supporting papers 1-3; 6-8; 19-20; 21-22; [illegible]

Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13-14; 15-16; 23-24; 45-46; Replying Affidavits and supporting papers 25-26; 30-31;

Memorandum of Law 4-5; 11-12; 17-18; 32-33; 34-35; 36-37; 38-39; 40-41; 42; 47; it is

ORDERED, that this motion by defendant, Ulysses I & Company, Inc., [Seq. 005], for an Order pursuant to CPLR 3211 (a)(1) and (7) dismissing the Complaint or, in the alternative, pursuant to CPLR 3211(c) and CPLR 3212, directing the entry of summary judgment in favor of moving defendant and against the plaintiff is denied; and it is further

ORDERED, that the motion by defendant, Ulysses I & Company, Inc., brought by Order to Show Cause granted April 12, 1999 [D'Emilio, J.], [Seq. 006], for an Order (i) pursuant to CPLR 3212, directing the entry of summary judgment in favor of moving defendant and against plaintiff on moving defendant's counterclaim for use and occupancy of the subject premises in the amount of $369,593.08; (ii) ordering the immediate removal of the plaintiff from the premises in the absence of such payment; and (iii) pursuant to CPLR 6514, vacating the plaintiff's notice of pendency or, alternatively, pursuant to CPLR 6515, requiring an undertaking from plaintiff in the amount of at least $2,000,000.00 as a condition for continuation of the notice of pendency is denied; and it is further

ORDERED, that the cross-motion by defendant Jack Rounick, [Seq. 007], for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint or, in the alternative, pursuant to CPLR 3211(c) and CPLR 3212, directing the entry of summary judgment in favor of moving defendant and against the plaintiff, is denied; and it is further

ORDERED, that the motion by defendant, Jack Rounick [Seq. 008], for an Order permitting defendant Rounick to remove from the premises located at 57 West End Road, East Hampton, New York, all furnishings belonging to him, is denied; and it is further

ORDERED, that the cross-motion by plaintiff, Gary Feldstein [Seq. 009], for an Order pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiff and against the defendants Jack Rounick and Ulysses I & Company, Inc., upon the ground that there are no triable issues of fact, is granted.

On or about September 20, 1992, the plaintiff, Gary Feldstein, entered into a lease agreement with defendant, Jack Rounick, for the rental of the waterfront property located at 57 West End Road in East Hampton, New York.

On May 24, 1993 Feldstein entered into a written contract to purchase said property from Rounick for a sales price of $7,000,000.00. Pursuant to the terms of the contract, Feldstein was credited [illegible] payment of $250,000.00 previously made to Rounick on September 2[?], 1992. He was required to make subsequent payments of $350,000.00 every October 1, commencing in 1993 and terminating in 1996. The seller, Rounick, agreed to transfer good and marketable title to purchaser Feldstein on or before October 1, 1997 in exchange for an additional payment of $1,300,000.00 and a first mortgage to be held by Rounick as mortgagee, as well as agreeing not to further encumber the property or borrow any funds utilizing the subject property as collateral.

The parties entered into a First Amendment to the Contract dated July 4, 1993 which provided for a more rapid repayment schedule. Feldstein and Rounick then entered into a Second Amendment to the Contract dated May 24, 1997, in which Rounick expressly acknowledged Feldstein's previous payments totaling $1,800,000.00, and further "ratified and confirmed" the original contract and the First Amendment. Said Second Amendment also postponed the closing date until October 1, 1998, and provided Rounick with monthly payments

advanced against the payment that would have been due pursuant to the First Amendment on October 1, 1997. Feldstein was also given the right in the Second Amendment to accelerate the closing date to an earlier point in time upon an accelerated payment of $1,200,000.00.

No evidence has been introduced to demonstrate that Feldstein had failed to make all payments due under the contract and its amendments on a timely basis, through August 25, 1998.

On August 10, 1998 Feldstein entered into a conditional agreement with Peter Morton, whereby Feldstein agreed that he would, under certain conditions, assign to Morton at the closing with Rounick, all of Feldstein's rights to the property, pursuant to the fully disclosed agreement with Rounick. The August 10, 1998 agreement did not constitute an assignment and was expressly conditioned upon Feldstein's ability to obtain Rounick's consent for the transfer of title to Morton. Said agreement in no way prohibited Feldstein from closing directly with Rounick on the property, and Rounick's refusal to consent to the Feldstein-Morton agreement would serve to prevent the effectuation of the anticipated assignment, without effecting the Feldstein-Rounick closing.

By letter dated August 20, 1998 Feldstein informed Rounick of his intentions and asked Rounick to either accept a mutually agreeable amount representing the present discounted value of all future payments to be made under the agreement, or to accelerate, consistent with the terms of the Second Amendment, the closing of title to August 28, 1998. There is no record of a response from Rounick.

On August 25, 1998, Feldstein's attorneys received a letter from Proskauer, Rose LLP, the attorneys representing defendant Ulysses, informing Feldstein that Rounick had sold the subject property to Ulysses on August 24, 1998 and that Feldstein's rights to the property had been extinguished. There is no evidence to suggest that Feldstein, at any time prior to the sale to Ulysses, as either tenant or prospective purchaser, had

been in default of any agreement or had been advised in any way of such proposed sale.

By letter dated September 1, 1998, Feldstein informed both Rounick and Ulysses that the $33,500.00 payment due Rounick under the May 24, 1997 Second Amendment would be placed in escrow with Feldstein's attorneys pending resolution of the respective rights of all parties to the transactions.

By letter dated September 3, 1998, and pursuant to paragraph 2 A (iii) of the Second Amendment, Feldstein advised both Rounick and Ulysses that he wished to accelerate the closing of title to the subject property and that such closing would be held on September 10, 1998.

On September 9, 1998, Feldstein received a letter from Ulysses attorneys stated that, inter alia, Ulysses had "a number of serious questions about [the] authenticity" of the Second Amendment and that because "of the questions that have arisen in this matter" Ulysses would not attend the closing. Subsequently, Ulysses' attorneys viewed the original executed and notarized Second Amendment, and since said inspection, neither defendant has questioned the authenticity of the Second Amendment.

On September 10, 1998 the scheduled closing was held and attended by Feldstein, his attorneys and attorneys for Peter Morton. Neither Rounick, a representative from Ulysses nor their respective attorneys were present at the closing.

It also appears that Ulysses, as part of the transaction with Rounick, placed a $3,000,000.00 purchase money mortgage on the property, in apparent breach of paragraph 8 of the contract between Feldstein and Rounick.

Despite attempts by Ulysses to infer Feldstein's financial inability to actually close title, by noting Feldstein's unwillingness to produce tax returns and remarking on the bankruptcy of a company of which Feldstein was a minority shareholder, Ulysses was unable to contradict Feldstein's submission of the affidavit of Josef Fischer, managing partner of Decten Fund, L.P., which demonstrated that at the time of closing, Feldstein

maintained an account balance in excess of $1,000,000.00, more than the amount due at closing, and that such funds were unencumbered and available for said closing, and all indications are that Feldstein remains ready, willing and able to complete the subject transaction.

The defendants maintain that Feldstein's placement [illegible] September 1, 1998 payment of $33,500.00 in escrow with his attorneys, together with his non-payment of two real estate tax bills totaling $17,084.70, due after the date of defendants' repudiation of the contract, constitute a breach of the contract excusing the defendants' obligation to complete the sale of the property to Feldstein, is unconvincing and unavailing.

There is no evidence to demonstrate, with respect to the aforementioned real estate tax bills not paid by Feldstein, that either defendant have given to Feldstein the original bills, a notice of default or a notice to cure. Neither has evidence been introduced to demonstrate that Feldstein was in default of any of his contractual obligations prior to August 25, 1998. Instead, the documentary evidence, together with the evidence elicited by deposition and other means of disclosure, clearly indicate that it is the defendant Rounick who is in breach of the subject agreement and that the plaintiff Feldstein is entitled to remedy of specific performance.

The evidence submitted, including the pleadings, affidavits in both support and opposition of the various motions and cross-motions, and transcripts of depositions clearly demonstrate that it was defendant Rounick who breached the contract with Feldstein, when the former sold and encumbered the subject property to defendant Ulysses prior to the contractually anticipated closing date with Feldstein. Such breach by Rounick excused Feldstein from further [illegible] performance under the contract between Rounick and Feldstein [illegible] renders the Court unable to grant Rounick's motion for summary judgment dismissing the Complaint (Seq. 007).

With regard to the additional relief sought by Rounick (Seq. 008), said defendant may remove any of his furnishings re-

maining at the subject premises upon his transfer of the property to Feldstein pursuant to their contract of sale.

Ulysses' motion for summary judgment or dismissal of the Complaint (Seq. 005) is unavailing as the Court finds that none of the actions attributed by Ulysses to Feldstein are sufficient to bar specific performance. Feldstein did not assign his contract rights in the subject property to Morton, rather, Feldstein and Morton executed an agreement to enter into an assignment which was contingent upon Rounick's consent, and expressly conditioned upon the delivery of title from Rounick to Morton. The agreement to assign did not, in any way, preclude Feldstein from closing under the contract with Rounick in accordance with its original terms (See, e.g., Saltair Shinneock, Inc. v. William Yarroll, 56 AD2d 625.)

Feldstein's placement of the $33,500.00 in escrow with his attorney and his non-payment of real estate taxes for the subject property after Rounick's repudiation of the Feldstein-Rounick agreement does not constitute a breach by Feldstein or a default in his obligations under the agreement. Rather, as the party seeking summary judgment, Ulysses has failed to meet his burden of proffering evidence of a default by Feldstein prior to Ulysses' repudiation of the contract (See, Alvarez v. Prospect Hospital, 68 NY2d 320, 324; 508 NYS2d 923, 925; 501 NE2d 572.) Indeed, it is uncontroverted that at all times throughout these proceedings, Feldstein has had the financial wherewithal and has remained ready, willing and able to close title to the subject premises, pursuant to the written contract of sale with Rounick.

With regard to the relief sought by Ulysses (Seq. 006), on its counterclaim for use and occupancy of the subject premises, the Court notes that such relief is the exclusive remedy only where a landlord-tenant relationship is in existence. No evidence of either a written or an oral lease agreement has been provided to the Court, nor has a copy of the Ulysses-Rounick contract been tendered. Accordingly, the requested relief must be denied.

The totality of the evidence submitted by way of the motions and cross-motions, together with the voluminous deposition transcripts, clearly demonstrate that the plaintiff Feldstein has not breached or defaulted in any of his obligations under the Feldstein-Rounick contract of sale dated May 24, 1993, the First Amendment dated July 4, 1993 or the Second Amendment dated May 24, 1997, and remains ready, willing and able to complete the transaction contemplated by said contract and amendments. Since any breach of said contract was committed by defendant Rounick, plaintiff has demonstrated his entitlement to the remedy of specific performance.

The foregoing shall constitute the judgment and decision of the Court.

Dated: January 31, 2000

/s/ Gerard D'Emilio
GERARD D'EMILIO, J.S.C.